A **TENGKU DATO' IBRAHIM PETRA TENGKU INDRA PETRA v. PETRA PERDANA BHD & ANOTHER APPEAL**

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
ZULKEFLI AHMAD MAKINUDIN PCA
B ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 02(f)-7-03-2016 (W) & 02(f)-8-03-2016 (W)]
14 DECEMBER 2017

C

COMPANY LAW: *Directors – Fiduciary duties – Breach of – Divestments of shareholding in subsidiary company – Parent company lost controlling shares in subsidiary company – Whether divestments necessary – Whether divestments had valid purposes – Whether directors acted in best interest of company – Whether* D *directors sought professional advice – Whether directors in breach of fiduciary duties – Whether there was conspiracy to injure parent company – Test for breach of directors' duties – Companies Act 1965, s. 132(1C)*

COMPANY LAW: *Resolutions – Ordinary resolution – Extraordinary general meeting passed ordinary resolution that general mandate be given to parent company* E *to divest subsidiary company – Parent company lost controlling shares in subsidiary company – Whether directors obligated to comply with terms of shareholders' divestment mandate as if prescribed by parent company's articles of association – Whether regulations under articles of association – Companies Act 1965, s. 132(1C)*

F ***COMPANY LAW:*** *Shareholders – Powers – Powers of management – Whether conferred on shareholders by articles of association – Whether vested in Board of Directors*

Two related appeals emanated from the same action initiated by Petra Perdana Berhad ('the plaintiff') in the High Court. The first appeal was by Tengku Dato' Ibrahim Petra ('the first defendant') while the second appeal G was by Wong Fook Heng and Tiong Young Kong ('the second and third defendants'). In an extraordinary general meeting ('EGM') in 2007, the plaintiff's Board of Directors ('the Board') passed an ordinary resolution that a general mandate be given to the plaintiff to divest 19.5 million shares in Petra Energy Berhad ('PEB'), a subsidiary of the plaintiff ('the shareholders' H divestment mandate'). The plaintiff divested to Lembaga Tabung Haji a total of 9 million of its ordinary shares in PEB ('the first divestment'). The first divestment represented approximately a 4.62% equity stake in PEB. Consequently, the plaintiff's holding in PEB was reduced from 64.62% to 60%. Problems arose when there was a threatened litigation due to a delayed I payment. Since the plaintiff had exhausted all its internal funds, the Board resolved to sell a total of 10.5 million (5.38%) PEB shares for cash ('the

August Board mandate'). Pursuant to this August Board mandate, the plaintiff divested 10.5 million ordinary shares in PEB to TA First Credit Sdn Bhd ('the second divestment') thus reducing the plaintiff's shareholding in PEB to 54.62%. A few months later, when the plaintiff was facing financial difficulties and serious cash flow problems, the Board resolved that the plaintiff divest its remaining 54.62% shareholding in PEB to meet the plaintiff's cash flow requirements ('November Board mandate'). Pursuant to this November Board mandate, the plaintiff sold 48.8 million of its shares in PEB (25.03%) to one Shorefield Resources Sdn Bhd ('Shorefield') ('the third divestment'). Shorefield, now the largest shareholder in PEB, was controlled by one Datuk Bustari. The plaintiff's claim in the High Court against the defendants was that, in causing the plaintiff to undertake the second and third divestment ('the divestments'), (i) the first to third defendants ('the defendants), in breach of their fiduciary, statutory or common law duties, failed to act in the best interest of the plaintiff, causing the plaintiff to suffer losses and damages; (ii) Lee Mee Jiong ('the fourth defendant'), as the Director of PEB, dishonestly assisted the defendants in the said various breaches of duty; and (iii) the defendants and the fourth defendant conspired to injure the plaintiff by way of the divestments. The defendants argued that (i) the divestments were effected *bona fide* in the interests of the plaintiff pursuant to the mandates of the Board and there was no conspiracy to injure the plaintiff; (ii) the primary purpose of the divestments was to meet the urgent liquidity needs of the plaintiff and to alleviate its dire cash flow position; (iii) they relied on professional advisers in carrying out the transactions; and (iv) they had duly discharged their fiduciary and statutory duties as the directors of the plaintiff with regard to the divestments. The High Court Judge ('the HCJ') dismissed the plaintiff's claim and held that, *inter alia*, (i) the divestments were carried out for a proper purpose; (ii) the defendants had not breached their fiduciary duties as, in selling the PEB shares, they (a) acted in the best interest of the plaintiff; (b) relied on professional advice; and (c) acted pursuant to the mandates of the Board; and (iii) the plaintiff failed to prove the alleged conspiracy between the defendants and the fourth defendant. However, the plaintiff was successful in its appeal at the Court of Appeal. Reversing the decision of the High Court, the Court of Appeal held that (i) the defendants, as directors, were obligated to comply with the terms of the shareholders' divestment mandate as if prescribed by the plaintiff's articles of association. Such regulations were made at the plaintiff's EGM and were regulations under art. 115 of the plaintiff's articles of association; (ii) the purpose of the second divestment could not be said to improve the liquidity position of the plaintiff; (iii) the third divestment was not *bona fide* in the best interest of the plaintiff; and (iv) there was an elaborate scheme to ensure that Shorefield acquired a controlling interest of PEB. Hence, the present appeals.

Held (allowing appeal; setting aside orders of Court of Appeal; reinstating orders of High Court)

Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) There was no appealable error in the HCJ's conclusions. Her Ladyship's findings were clearly justified and correct. The first, second and third divestment of the PEB shares were undertaken to address genuine urgent cash flow problems caused by a downturn in the plaintiff's business. There was no conspiracy contrived by the defendants to injure the plaintiff. In determining the dominant purpose of the divestments, the HCJ relied on contemporaneous documents, including the Board's minutes. The contemporaneous documents revealed that the decisions to sell the PEB shares were made, collectively and unanimously, by all members of the Board at the Board meetings concerned. These documents also disclosed that the Board, including the defendants, relied on the advice of the senior management of the plaintiff and professional advisers in arriving at the decisions to sell the PEB shares. These were important documents that the Court of Appeal failed to consider when deciding the key issue of the dominant purpose of the divestments. (paras 61, 62 & 93)

(2) Section 132(1C) of the Companies Act 1965 ('the Act') provides that a director, in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements. The decision to sell the PEB shares was independently made by the directors after making an independent assessment of the professional advice. Prior to the third divestment, professional advice was sought from (i) a legal firm pertaining to the mechanism to be undertaken; (ii) the bank pertaining to methods to raise funds to alleviate the plaintiff's financial difficulties; and (iii) TA Securities Holdings Bhd. There was no evidence of collusion between the defendants and the professionals who advised them. (para 85)

(3) The Court of Appeal made reference to the fact that there was some personal relationship between the first defendant and Datuk Bustari. This influenced the decision of the Court of Appeal in reversing the findings of facts by the High Court. The alleged family connection was too remote to be of any significance. It was wholly speculative of the Court of Appeal to conclude that Shorefield was linked to the first defendant through Datuk Bustari. (para 81)

(4) Shareholders in general meetings may not control the powers of management conferred by the articles of associations on a Board of Directors. If powers are vested in the directors, they and they alone can exercise those powers. Under arts. 151(1) and (2) of the plaintiff's article of association, the general power to manage the plaintiff vested in the

Board. Significantly, it recognised that the Board is the primary organ of the plaintiff; directors are not mere agents of the company. (paras 120, 129 & 193)

(5) The powers of management, including the sale of the plaintiff's shares in PEB, conferred on the plaintiff's directors by the Act and art. 115 of the plaintiff's articles of association could not be overridden by an ordinary resolution passed by a simple majority of the plaintiff's shareholders at an EGM. It does not follow, and should not be assumed that ordinary resolution passed at the EGM, would constitute regulation under art. 115. There was no reason and justification to conclude that shareholders' resolutions carried out at a general meeting of the plaintiff were 'regulations' pursuant to art. 115 of the plaintiff's articles of association. (para 147)

(6) The limiting words 'subject to regulations as may be prescribed by the company in general meeting' in art. 115(1) of the plaintiff's articles of association do not confer upon the plaintiff's shareholders in a general meeting a general supervisory power over the directors whether in respect of their specific or general powers or both. The word 'regulations' has the same meaning as the word 'articles' such that if shareholders want to interfere, whether in respect of specific or general powers, they can only do so by altering the articles to take away the powers of the Board and this can only be done by a special resolution. An ordinary resolution, like the shareholders divestment mandate, was not a 'regulation' within the meaning of art. 115(1) of the plaintiff's articles of association. (para 193)

(7) The test for breach of duty of a director and acting in 'the interest of the company' has an objective element; whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. Against the background of the case, an honest and intelligent man in the position of the defendants would reasonably have concluded that the divestments were in the best interests of the plaintiff. There was clearly no evidence that as directors of the plaintiff, the defendants had acted in breach of their duties to the plaintiff. What the defendants did was for a proper purpose and in good faith in the best interest of the plaintiff. (paras 172 & 180)

Bahasa Malaysia *Headnotes*

Dua rayuan yang bersangkutan timbul susulan tindakan sama yang dimulakan oleh Petra Perdana Berhad ('plaintif') di Mahkamah Tinggi. Rayuan pertama oleh Tengku Dato' Ibrahim Petra ('defendan pertama') manakala rayuan kedua oleh Wong Fook Heng dan Tiong Young Kong ('defendan kedua dan ketiga'). Dalam satu mesyuarat agung luar biasa ('EGM') pada 2007, Lembaga Pengarah plaintif ('Lembaga') membenarkan

A resolusi biasa agar mandat am diberi kepada plaintif untuk menyahlaburkan 19.5 juta saham dalam Petra Energy Berhad ('PEB'), subsidiari plaintif ('mandat nyahlaburan pemegang-pemegang saham'). Plaintif menyahlaburkan sejumlah 9 juta saham biasanya dalam PEB kepada Lembaga Tabung Haji ('nyahlaburan pertama'). Nyahlaburan pertama mewakili kira-kira 4.62% B kepentingan ekuiti dalam PEB. Berikutan itu, pegangan plaintif dalam PEB berkurang daripada 64.62% menjadi 60%. Masalah-masalah timbul apabila terdapat ugutan litigasi akibat kelewatan membayar. Oleh kerana plaintif telah menghabiskan kesemua dana dalamannya, Lembaga memutuskan untuk menjual sejumlah 10.5 juta (5.38%) saham PEB bagi mendapatkan tunai C ('mandat Ogos Lembaga'). Berikutan mandat Ogos Lembaga ini, plaintif menyahlaburkan 10.5 juta saham biasa dalam PEB kepada 54.62% kepada TA First Credit Sdn Bhd ('nyahlaburan kedua'), mengurangkan pegangan saham dalam PEB menjadi 54.62%. Beberapa bulan kemudian, apabila plaintif berhadapan dengan kesempitan kewangan dan masalah aliran tunai yang serius, Lembaga memutuskan agar plaintif menyahlaburkan baki D pegangan sahamnya sebanyak 54.62% dalam PEB untuk memenuhi keperluan-keperluan aliran tunai plaintif ('mandat November Lembaga'). Susulan mandat November Lembaga ini, plaintif menjual 48.8 juta sahamnya dalam PEB (25.03%) kepada sebuah syarikat yang dikenali sebagai Shorefield Resources Sdn Bhd ('Shorefield') ('nyahlaburan ketiga'). E Shorefield, kini pemegang saham terbesar dalam PEB, dikawal oleh seorang bernama Datuk Bustari. Tuntutan plaintif di Mahkamah Tinggi terhadap defendan-defendan adalah bahawa, dalam menyebabkan plaintif menjalankan nyahlaburan kedua dan ketiga ('nyahlaburan-nyahlaburan tersebut'), (i) defendan pertama hingga ketiga ('defendan-defendan'), melanggar F tanggungjawab fidusiari, statutori dan common law mereka, gagal bertindak demi kepentingan plaintif, menyebabkan plaintif mengalami kehilangan dan kerugian; (ii) Lee Mee Jiong ('defendan keempat') sebagai Pengarah PEB, secara tidak jujur membantu defendan-defendan dalam pelbagai dakwaan pelanggaran tanggungjawab ini; dan (iii) defendan-defendan dan defendan G keempat berkonspirasi untuk menjejaskan plaintif melalui nyahlaburan-nyahlaburan tersebut. Defendan-defendan mendalihkan bahawa (i) nyahlaburan-nyahlaburan tersebut dijalankan secara suci hati demi kepentingan-kepentingan plaintif dengan mandat-mandat Lembaga dan tiada konspirasi untuk menjejaskan plaintif; (ii) tujuan utama nyahlaburan-H nyahlaburan tersebut adalah untuk memenuhi keperluan-keperluan segera likuiditi plaintif dan untuk meringankan kedudukan aliran tunai yang teruk; (iii) mereka bergantung pada penasihat-penasihat profesional dalam menjalankan transaksi-transaksi tersebut; dan (iv) mereka telah melepaskan tanggungjawab statutori dan fidusiari mereka dalam nyahlaburan-nyahlaburan tersebut. Hakim Mahkamah Tinggi ('HMT') menolak tuntutan I plaintif dan memutuskan, antara lain, (i) nyahlaburan-nyahlaburan tersebut dijalankan bagi tujuan wajar; (ii) defendan-defendan tidak melanggar

tanggungjawab fidusiari mereka kerana, dalam menjual saham-saham PEB, mereka (a) bertindak demi kepentingan plaintif; (b) bergantung pada nasihat profesional; dan (c) bertindak menurut mandat Lembaga; dan (iii) plaintif gagal membuktikan dakwaan konspirasi antara defendan-defendan dan defendan keempat. Walau bagaimanapun, plaintif berjaya dalam rayuannya di Mahkamah Rayuan. Mengakas keputusan Mahkamah Tinggi, Mahkamah Rayuan memutuskan (i) defendan-defendan, sebagai pengarah, wajib mematuhi terma-terma mandat nyahlaburan pemegang-pemegang saham seolah-olah seperti ditetapkan oleh artikel persatuan plaintif. Peraturan-peraturan demikian dibuat semasa EGM plaintif dan adalah peraturan-peraturan bawah art. 115 artikel peraturan plaintif; (ii) tujuan nyahlaburan kedua tidak boleh dikatakan untuk membaik pulih kedudukan likuidasi plaintif; (iii) nyahlaburan ketiga tidak dibuat secara suci hati demi kepentingan plaintif; dan (iv) terdapat perancangan terperinci untuk memastikan Shorefield memperoleh kawalan kepentingan PEB. Maka timbul rayuan-rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah-perintah Mahkamah Rayuan; dan menghidupkan semula perintah-perintah Mahkamah Tinggi)

Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Tiada kekhilafan dalam kesimpulan-kesimpulan HMT untuk dirayu. Dapatan-dapatan beliau jelas beralasan dan betul. Nyahlaburan pertama, kedua dan ketiga saham-saham PEB dibuat demi penyelesaian segera masalah aliran tunai yang disebabkan oleh kemerosotan perniagaan plaintif. Tiada konspirasi oleh defendan-defendan untuk menjejaskan plaintif. Dalam memutuskan tujuan utama nyahlaburan-nyahlaburan, HMT bergantung pada dokumen-dokumen semasa, termasuk minit Lembaga. Dokumen semasa ini mendedahkan bahawa keputusan-keputusan menjual saham PEB dibuat secara kolektif dan sebulat suara oleh ahli-ahli Lembaga semasa mesyuarat-mesyuarat Lembaga berkenaan. Dokumen-dokumen ini juga mendedahkan Lembaga, termasuk defendan-defendan, bergantung pada nasihat pengurusan kanan plaintif dan penasihat-penasihat profesional dalam memutuskan untuk menjual saham-saham PEB. Kesemuanya adalah dokumen-dokumen penting yang Mahkamah Rayuan gagal pertimbangkan dalam memutuskan isu utama iaitu tujuan utama nyahlaburan-nyahlaburan tersebut.

(2) Seksyen 132(1C) Akta Syarikat 1965 ('Akta') memperuntukkan bahawa seorang pengarah, dalam menjalankan tanggungjawabnya sebagai pengarah, boleh bergantung pada maklumat, nasihat profesional atau pakar, pendapat-pendapat, laporan-laporan atau kenyataan-kenyataan. Keputusan menjual saham-saham PEB dibuat secara bebas oleh pengarah-pengarah selepas membuat penilaian bebas nasihat-nasihat

A profesional. Sebelum nyahlaburan ketiga, nasihat profesional diminta daripada (i) firma guaman tentang mekanisme yang patut diguna pakai; (ii) bank berkenaan cara-cara mengumpul dana untuk meringankan kesempitan kewangan plaintif; dan (iii) TA Securities Holdings Bhd. Tiada keterangan yang menunjukkan pakatan sulit antara defendan-
B defendan dan ahli-ahli profesional yang menasihati mereka.

(3) Mahkamah Rayuan merujuk fakta bahawa terdapat hubungan peribadi antara defendan pertama dan Datuk Bustari. Ini mempengaruhi keputusan Mahkamah Rayuan dalam mengakas dapatan-dapatan fakta oleh Mahkamah Tinggi. Dakwaan hubungan kekeluargaan tiada kaitan
C dan tidak penting. Mahkamah Rayuan membuat spekulasi sama sekali dalam menyimpulkan Shorefield ada kaitan dengan defendan pertama melalui Datuk Bustari.

(4) Pemegang-pemegang saham dalam mesyuarat agung tidak boleh mengawal kuasa pengurusan yang diperuntukkan oleh artikel persatuan
D buat Lembaga Pengarah. Jika kuasa sedemikian terletak pada pengarah-pengarah, mereka dan hanya mereka sahaja yang boleh menjalankan kuasa-kuasa tersebut. Bawah art. 151(1) dan (2) artikel persatuan plaintif, kuasa am menguruskan plaintif terletak pada Lembaga. Nyata sekali ini mengiktiraf Lembaga sebagai organ utama plaintif; pengarah-
E pengarah bukan sekadar ejen syarikat.

(5) Kuasa-kuasa pengurusan, termasuk jualan saham-saham plaintif dalam PEB, yang diperuntukkan buat pengarah-pengarah plaintif oleh Akta dan art. 115 artikel persatuan plaintif tidak boleh mengatasi resolusi biasa yang ditetapkan semasa EGM. Ini tidak disusuli, dan tidak patut
F dianggap bahawa resolusi biasa yang ditetapkan dalam EGM, akan membentuk peraturan bawah art. 115. Tiada sebab dan alasan untuk menyimpulkan bahawa resolusi pemegang-pemegang saham yang dibuat semasa mesyuarat agung plaintif adalah 'peraturan' bawah art. 115 artikel persatuan plaintif.

G **(6)** Perkataan-perkataan terhad 'tertakluk pada peraturan seperti yang ditetapkan oleh syarikat dalam mesyuarat agung' dalam art. 115(1) artikel persatuan plaintif tidak memberi pemegang-pemegang saham plaintif dalam mesyuarat agung satu kuasa penyeliaan am terhadap pengarah-pengarah sama ada kuasa khusus atau am atau kedua-duanya.
H Perkataan 'peraturan' mempunyai maksud yang sama dengan perkataan 'artikel-artikel' hinggakan jika pemegang saham hendak campur tangan, sama ada kuasa khusus atau am, mereka hanya boleh berbuat demikian dengan meminda artikel-artikel tersebut untuk menarik kuasa Lembaga dan ini hanya boleh dilakukan melalui resolusi khas. Satu resolusi biasa,
I seperti mandat nyahlaburan pemegang-pemegang saham, bukan 'peraturan' dalam maksud art. 115(1) artikel persatuan plaintif.

(7) Ujian pelanggaran tugas seorang pengarah dan bertindak 'demi kepentingan syarikat' mempunyai elemen objektif; sama ada seorang yang jujur dan cerdik berjawatan pengarah dalam syarikat terlibat boleh, dalam keseluruhan hal-hal keadaan yang wujud, percaya secara munasabah bahawa transaksi tersebut adalah bagi manfaat syarikat. Berlatarbelakangkan kes ini, seorang yang jujur dan cerdik dalam kedudukan defendan-defendan akan secara munasabah menyimpulkan nyahlaburan-nyahlaburan tersebut dibuat demi kepentingan plaintif. Jelas tiada keterangan bahawa, sebagai pengarah plaintif, defendan-defendan bertindak melanggar kewajipan mereka terhadap plaintif. Yang defendan-defendan telah lakukan adalah bagi tujuan wajar dan dengan suci hati demi kepentingan plaintif.

Case(s) referred to:

Allan v. Gold Reefs of West Africa Limited [1900] 1 Ch 656 ***(refd)***
Automatic Self-Cleansing Filter Syndicate Co v. Cuninghame [1906] 2 Ch 34 ***(refd)***
Charterbridge Corpn Ltd v. Lloyds Bank Ltd [1970] Ch 62 ***(refd)***
Choo Ah Pat v. Chow Yee Wah & Anor [1971] 1 LNS 22 FC ***(refd)***
Credit Development Pte Ltd v. IMO Pte Ltd [1993] 2 SLR 370 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1989] 1 MLJ 35 ***(refd)***
Ferguson v. Wilson [1866] LR 2 Ch 89 ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Goh Chan Peng and three others v. Beyonics Technology Ltd and another [2017] SGCA 40 ***(refd)***
Henderson v. Foxworth Investments Ltd and Another [2014] 1 WLR 2600 ***(refd)***
Holmes v. Keys [1959] Ch 199 ***(refd)***
Housen v. Nikolaisen [2002] 2 SCR 235 ***(refd)***
Howard Smith Ltd v. Ampol Petroleum Ltd and Others [1974] AC 821 ***(refd)***
Hutton v. West Cork Railway Co [1883] 23 Ch D 654 ***(refd)***
In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 ***(refd)***
Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1994] 3 SLR (R) 1064 ***(refd)***
Isle of Wight Railway Company v. Tahourdin [1883] 25 Ch D 320 ***(refd)***
John Shaw & Sons (Salford) Limited v. Peter Shaw and John Shaw [1935] 2 KB 113 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lee Soh Hua v. Kow Lup Piow & Ors [1984] 2 CLJ 85; [1984] 1 CLJ (Rep) 191 FC ***(refd)***
Len Min Kong v. United Malayan Banking Corp Bhd & Another Appeal [1998] 2 CLJ 879 CA ***(refd)***
Marshalls Valve Gear Co v. Manning Wardle & Co Ltd [1909] 1 Ch 267 ***(refd)***
McGraddie v. McGraddie and Another [2013] 1 WLR 2477 ***(refd)***
Mills v. Mills (1938) 60 CLR 150 ***(refd)***
Ming Holdings (M) Sdn Bhd v. Yusof Latif Holdings (M) Sdn Bhd [2006] 3 CLJ 72 CA ***(refd)***

Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors [1973] 1 LNS 105 FC ***(refd)***

Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor and Other Appeals [2012] 5 CLJ 169 CA ***(refd)***

Re Smith & Fawcett Limited [1942] 1 Ch 304 ***(refd)***

Regentcrest Plc (In Liquidation) v. Cohen [2001] BCC 494 ***(refd)***

Quin & Axtens, Limited v. Salmon [1909] 1 Ch 311 ***(refd)***

Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(refd)***

Shuttleworth v. Cox Brothers & Company (Maidenhead), Ltd and Others [1927] 2 KB 9 ***(refd)***

Scott v. Scott [1943] 1 All ER 582 ***(refd)***

Spedley Securities Ltd (in liq.) v. Greater Pacific Investments Pty Ltd (in liq) [1992] 7 ACSR 155 ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

The Gramophone and Typewriter, Ltd v. Stanley [1908] 2 KB 89 ***(refd)***

Thomas Logan Ltd v. Davis (1911) 104 LT 914 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Vita Health Laboratories Pte Ltd and Others v. Pang Seng Meng [2004] 4 SLR (R) 162 ***(refd)***

Watt (or Thomas) v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:

Companies Act 1965 (since repealed), ss. 4, 30(2), 31(1), 64, 128, 131B(2), 132(1), (1A), (1B), (1C), (6), 132B, 132C, 354, Fourth Schedule

Companies Act 2016, s. 211

Evidence Act 1950, s. 114(g)

Companies Act (Cap 50) [Sing], s. 157A

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Directors' Duty to Act in the Interests of the Company: Subjective or Objective? [2015] JBL Issue 2

Farrar's Company Law, 4th edn, p 365

Ford's Principles of Corporations Law, 10th edn, p 211

Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law,* 2015, pp 286-289, 361

LCB Gower, *The Principles of Modern Company Law,* 3rd edn, p 136

Loh Siew Cheang, *Corporate Powers: Accountability,* 2nd edn, p 146

LS Sealy, *Cases and Materials in Company Law,* 3rd edn, p 271

Mortimore QC, *Company Directors: Duties, Liabilities, and Remedies,* 2nd edn, paras 4.17-4.27

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Stephen Bottomley's The Constitutional Corporation, pp 21, 82

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Woon & Hicks, *The Companies Act of Malaysia: An Annotation*, LexisNexis, 2012, p 210

For the 1st appellant - Cyrus Das & James Khong; M/s James Khong
For the 2nd & 3rd appellants - Alex de Silva & Gajendran Balachandran; M/s Bodipalar Ponnudurai De Silva
For the respondent - Lim Kian Leong, Tan Wei Wei, Chris Lim Su Heng, Nur Khidmah Huzaisham & Colin Liew; M/s Chris Lim Su Heng

[Editor's note: For the Court of Appeal judgment, please see Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2015] 8 CLJ 856 (overruled).]
[For the High Court judgment, please see [2014] 1 LNS 236 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] These two related appeals emanated from the same action in the High Court of Malaya at Kuala Lumpur (Commercial Division) under Civil Suit No: D-22NCC-1057-2011. These appeals raised important questions in company law on governance and management of a company as between directors, and shareholders in general meetings. Disagreements concerning management and direction of a company have given rise to frequent legal disputes in courts; the present appeals are cases in point.

[2] The first appeal, which is Federal Court Civil Appeal No: 02(f)-7-03-2016(W) is by Tengku Dato' Ibrahim Petra bin Tengku Indra Petra (the first defendant in the High Court). The second appeal, which is Federal Court Civil Appeal No: 02(f)-8-03-2016 (W) is by Wong Fook Heng and Tiong Young Kong (the second and third defendants in the High Court). In both appeals, Petra Perdana Berhad (the plaintiff in the High Court), is the respondent.

[3] We shall refer to the parties in this judgment as they were cited in the High Court.

[4] The subject matter of the dispute between the parties revolved around the issue of the directors' duties to act in the best interest of the plaintiff in the divestments of the plaintiff's shareholding in Petra Energy Berhad ("PEB").

[5] PEB was a wholly-owned subsidiary of the plaintiff. To that extent, PEB comprised an asset of the plaintiff. PEB was important for the income base of the plaintiff. The Court of Appeal described PEB as the "jewel in the crown" of the plaintiff.

[6] In a nutshell, these appeals vitally concern alleged breaches by the directors of the duty owed to the plaintiff in the divestments of the PEB shares. The dispute centred on the purpose for which the divestments in 2009 were actually effected.

[7] As a consequence of these divestments, the plaintiff complained that it lost its controlling block of shares in PEB and that PEB ceased to be a subsidiary of the plaintiff. The plaintiff further complained that all the shares so divested eventually ended up in the hands of one Shorefield Resources Sdn Bhd ("Shorefield"), who became the single largest shareholder in PEB.

[8] The legal dispute arose when the plaintiff then took issue with these divestments by instituting the High Court action. After a lengthy trial stretching over 23 days, which involved 14 witnesses for both sides, the learned High Court Judge dismissed the plaintiff's claim with costs. Against that decision, the plaintiff proffered an appeal to the Court of Appeal. The Court of Appeal unanimously allowed the appeal and effectively reversed the decision of the High Court.

[9] As a result of the Court of Appeal's decision, the defendants applied for leave to appeal to this court. This court thereafter granted the defendants leave to appeal for the determination of several questions of law pertaining to the division of powers between shareholders and directors, the test for breach of director's duty, and 'best interest of the company'.

[10] Hence, the present appeals before us, which in substance arose from the reversal by the Court of Appeal of the decision of the High Court that essentially concluded that there was no breach by the defendants of their directors' duties in undertaking the divestments of the plaintiff's shares in PEB shares.

The Parties

[11] At the material time, the plaintiff was a public listed company whose shares were traded on the Main Board of Bursa Malaysia. The plaintiff was principally an investment holding company. The plaintiff's group of companies was predominantly an offshore marine services provider for the upstream oil and gas industry, both for the domestic and regional markets.

[12] At that material time, PEB, an investment holding company, was also a public listed company whose shares were traded on the Main Board of Bursa Malaysia. PEB was in the business of providing integrated brown field services for the upstream oil and gas industry and specialist services for the petrochemical and general industries in the domestic, regional and international markets.

[13] At all material times, the first to third defendants were directors of the plaintiff (unless addressed separately they will be referred to as "the defendants"). In addition to being a director, the first defendant was also the executive chairman of the plaintiff, and its chief executive officer. The first defendant was appointed as a director of the plaintiff in May 2000. The first and third defendants were also directors of PEB. The defendants were

removed as directors by members of the plaintiff at an Extraordinary General Meeting ("EGM") on 4 February 2010. Subsequently, the first defendant's employment as the chief executive officer of the plaintiff was terminated on 19 March 2010.

[14] The second defendant was an independent non-executive director of the plaintiff who was appointed on 27 July 2001 and remained so until his removal on 4 February 2010. He was also the chairman/member of the audit committee until his removal. The third defendant was appointed as an independent non-executive director of the plaintiff on 3 December 2008 and remained so until his removal on 4 February 2010.

The Facts

[15] The plaintiff was formed by the first defendant together with one Henry Kho and Francis Kho ("Kho Brothers"). At all material times, the Kho Brothers and the first defendant held shares in the plaintiff. The arrangements were such that the Kho Brothers did not have representation on the board of directors of the plaintiff but there was a mutual understanding between them that they remained in the day-to-day management of the plaintiff.

[16] PEB was listed on Bursa Malaysia on 26 July 2007. Its issued and paid-up capital was RM97,500,000 comprising 195,000,000 ordinary shares of par value RM0.50 each. The plaintiff owned 126,000,000 of the said ordinary shares. This represented approximately 64.62% of the issued and paid-up capital of PEB.

[17] Prior to that on about 26 February 2007, the board of directors of the plaintiff sought a general mandate from its shareholders for the divestment of up to 19,500,000 ordinary shares in PEB, representing 10% of PEB's issued and paid-up capital, after the PEB listing, for cash.

[18] The rationale for seeking such a mandate was to enable the plaintiff to effect divestments of portions of its PEB shares at opportune times, in the event of improving market conditions. Such a mandate would eliminate the need to convene separate general meetings to seek shareholders' consent, which would reduce expenses and resources. It would enable the plaintiff to raise and obtain monetary funding expeditiously, to repay borrowings of the plaintiff and to repay bonds that had been issued.

[19] What happened next was that the shareholders of the plaintiff had at an EGM convened on 26 April 2007 passed an ordinary resolution that a general mandate be given to the plaintiff to amongst others divest up to 19.5 million shares in PEB after its listing on the Main Board of Bursa Malaysia ("the shareholders' divestment mandate").

[20] The shareholders' divestment mandate provided, *inter alia*, that any divestment was to be for cash consideration; that any divestment was subject to the discretion of the board of directors provided that the price shall not be more than 10% discount of the five day weighted average market price of the ordinary shares of par value RM0.50 each in PEB preceding the relevant date of the divestment; and that the board of directors would endeavour to secure the best possible price for the PEB shares in the best interest of the plaintiff.

[21] The shareholders' divestment mandate was subject to an announcement by the plaintiff to Bursa Malaysia. This shareholders' divestment mandate was also renewed on an annual basis by the shareholders of the plaintiff in general meetings and such renewals were also the subject matter of various announcements by the plaintiff to Bursa Malaysia.

[22] On or about 10 December 2007, the plaintiff, pursuant to the shareholders' divestment mandate, divested to Lembaga Tabung Haji a total of 9 million of its ordinary shares held in PEB ("first divestment"). The first divestment represented approximately a 4.62% equity stake in PEB. As a result, the plaintiff's holding in PEB was reduced to 60% from 64.62%. The first divestment is not an issue in these appeals.

[23] Then problems started. A shipbuilder, Shin Yang Shipyard Sdn Bhd informed the board of directors of the plaintiff of its intention to institute legal action for the delayed payment for the vessel, Petra Galaxy. The Board was also informed that the plaintiff had exhausted all its internal funds to pay for the deposit for two other vessels. PEB required the vessels to meet the Shell contract. The Shell contract with PEB was valued at RM1.1 billion. The Board was concerned about the possible loss of the Shell contract if the vessels were not delivered on time. Evidently, there were insufficient internal funds in the plaintiff to meet such payments.

[24] In the circumstances, the board of directors at their meeting on 26 August 2009 resolved to sell a total of 10.5 million (5.38%) PEB shares for cash to meet the cash requirements. The Board authorised the first defendant to negotiate and finalise the price and sale of such shares ("August Board mandate").

[25] It was pursuant to this August Board mandate that the plaintiff divested 10.5 million ordinary shares in PEB to TA First Credit on 10 September 2009 ("second divestment") thus reducing the plaintiff's shareholding in PEB to 54.62%. The proceeds of sale, approximately RM16.065 million, were used to pare down bank borrowings. It is important to keep in mind that the second divestment was conducted pursuant to the August Board mandate and not through invocation of the shareholders' divestment mandate.

[26] It is equally important to note that the disposal of the 10.5 million shares did not require shareholders' approval, as the disposal was below the 25% threshold and did not constitute a disposal of a "substantial portion" of the plaintiff's assets. This was due to the fact that the share prices had declined by more than 50% in 2009 as compared to the time when the PEB shares were listed in July 2007. Accordingly, no shareholders' approval was required.

[27] A few months later, when it became apparent that the plaintiff was facing financial difficulties and serious cash flow problems, at a board of directors' meeting of the plaintiff convened on 18 November 2009, it was resolved that the plaintiff divest its remaining 54.62% shareholding in PEB to meet the plaintiff's cash flow requirements ("November Board mandate"). The Board was informed that the plaintiff suffered a financial loss of RM8.9 million for the third quarter of 2009 for the first time in its corporate history.

[28] The Board at this meeting on 18 November 2009, collectively agreed that it needed to find ways and means for the plaintiff to stay afloat for the following 12 months pending improvements to market conditions. Various options to raise funds including selling old vessels were considered. However, all the other methods would have taken too long to raise the funds. The sale of all the PEB shares held by the plaintiff at RM1.80 per share could raise a total of RM191 million which would enable the plaintiff to repay its outstanding loan of RM150 million and leave a surplus of RM41 million. Together with an expected sum of RM60 million expected from return of advances from PEB, this would enable the plaintiff to meet the projected shortfall of RM70 million for the period ending December 2010. The figures were based on projections given by one Shamsul bin Saad ("PW1"), one of the plaintiff's directors and Soon Fook Kian ("Soon"), the plaintiff's finance manager. Accordingly, after long deliberations, it was agreed that selling the PEB shares appeared to be the best option.

[29] The first defendant was then tasked by the board of directors of the plaintiff to carry out the disposal exercise. On or about 18 November 2009, the first defendant issued a letter on behalf of the plaintiff to TA Securities appointing TA Securities as an exclusive placement agent of the shares which the plaintiff held in PEB; and requesting that TA Securities carry out a valuation exercise to ascertain the "fair valuation of PEB shares" in question.

[30] Pursuant to the "November Board mandate", on or about 11 December 2009, the plaintiff sold 48.8 million of its shares in PEB (25.03%) to Shorefield ("third divestment"). Shorefield became the controlling shareholder. The third divestment did not require prior shareholders' approval. The sale did not constitute a sale of a "substantial portion of the plaintiff's property" ie, more than 25% of the total net assets of the plaintiff. The proceeds of the disposal were utilised to pare down bank

borrowings and the gearing ratio of the plaintiff's group of companies. The disposal resulted in a gain of approximately RM13.7 million for the plaintiff's group of companies.

[31] The remaining 29.59% shares in PEB to be divested pursuant to the board of directors' resolution 18 November 2009 were then deliberated upon at the board of directors' meeting of 22 December 2009 ("December Board mandate").

[32] However, the intended fourth divestment of the remaining 29.59% shares in PEB did not take place as PW1 obtained an injunction in Kuala Lumpur High Court Civil Suit No: D-22NCC-735-2009 restraining such sale of the shares.

[33] Meanwhile, from late 2008 to early 2009, the relationship between the Kho Brothers and the first defendant started to deteriorate. The Kho Brothers demanded representation on the plaintiff's board of directors. As a result, PW1, a nominee of the Kho Brothers, was then appointed as a director of the plaintiff.

[34] A corporate power struggle followed between the Kho Brothers and the first defendant. It developed into a more serious dispute and soon led a breakdown in relationship between them. It culminated, as testified by PW1 in his evidence, in both the first defendant and his wife together with the second and third defendants being removed as directors of the plaintiff at an EGM of 4 February 2010.

The Claim In The High Court

[35] The court action in the present case arose as soon as the Kho Brothers having gained control of the Board of the plaintiff caused the plaintiff to institute this claim against the defendants and four others. The fourth defendant ("Lee Mee Jiong") who was the executive director of PEB had resigned as a director of PEB sometime on or around 18 June 2010. The suit was settled against the fifth to seventh defendants (who were TA Securities Holdings, Yap Hock Seng and TA First Credit Sdn Bhd).

[36] The plaintiff's claim in the High Court against the defendants was essentially that in causing the plaintiff to undertake the second divestment and the third divestment, the defendants acted in breach of their statutory duties as set out in s. 132(1) of the Companies Act 1965 (the Act); further and/or in the alternative, the second and third defendants dishonestly assisted the first defendant in the various breaches of duty owed by the first defendant to the plaintiff, and were accessories thereto; further and/or in the alternative, the fourth defendant as director of PEB, dishonestly assisted the defendants in the various breaches of duty owed by the defendants to the plaintiff, and was accessory thereto; the defendants and the fourth defendant conspired, whether by lawful and/or unlawful means, to injure the plaintiff

vide the second divestment and the third divestment; as a result of the aforesaid acts or omissions, the plaintiff suffered loss and damage in relation to both the second divestment and the third divestment; and that the defendants and the other directors in breach of their fiduciary, statutory or common law duties, failed to act in the best interest of the plaintiff and as a result thereof, the plaintiff suffered loss and damage.

[37] It is significant to note that there was never any suggestion in the plaintiff's case that the defendants personally benefited from the impugned divestments.

The Defence

[38] The defence of the defendants were that in authorising and effecting the two impugned divestments of shares in PEB they acted at all material times pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. They maintained that they did, at all times act *bona fide* in the interests of the plaintiff when effecting such divestments, which were duly authorised by the Board. In essence, they pointed to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to alleviate its dire cash flow position for reason that the plaintiff was at the time in a tight liquidity position; there was threatened litigation by creditors, particularly one Shin Yang Shipyard; the plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9 million in the third quarter of 2009; and the plaintiff was unable to obtain funds expeditiously through other means.

[39] The defendants maintained that they duly discharged their fiduciary and statutory duties as directors of the plaintiff with regard to the disputed divestments. They pointed to the fact that they relied on professional advisors in carrying out these transactions.

[40] As for the plea of conspiracy, the defendants and the fourth defendant categorically denied the same, maintaining that there was never at any point of time any agreement arrived at between them and/or others to injure the plaintiff. They denied the existence of any scheme designed to injure the plaintiff by causing the divestments of the PEB shares.

Decision Of The High Court

[41] The learned High Court Judge found in favour of the defendants; the plaintiff failed to prove its case and the learned High Court Judge accordingly dismissed the claim against the defendants. In her 270-page judgment, the learned High Court Judge made numerous findings and conclusions of primary facts, which were well summarised by learned counsel for the second and third defendants as follows:

A (i) The first to third defendants had at all times acted in the best interest of the plaintiff in deciding to sell the PEB shares and did not breach their fiduciary duties to the plaintiff;

(ii) The first to third defendants did not act on a frolic of their own as the full Board had mandated the sale of the PEB shares which authorised
B the first defendant to carry out the sales;

(iii) The dominant purpose of the sale of the PEB shares was to meet urgent liquidity needs of the plaintiff;

(iv) The Board of the plaintiff, including the first to third defendants, had
C at all material times relied on the senior management of the plaintiff and professional advisers in arriving at the decisions to sell the PEB shares;

(v) The plaintiff was unable to prove its claims that there was a conspiracy to injure the plaintiff by the sale of the PEB shares;
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(vi) There was no evidence that the first to third defendants had in any way or manner benefited from the sale of the PEB shares;

(vii) The other members of the Board of the plaintiff did not object to nor protest against the sale of the PEB shares at all material times. In fact,
E the proposed sale of the entire 55% shareholding of PEB shares held by the plaintiff was something that was already known to the substantial shareholders of the plaintiff;

(viii) The evidence of the contemporaneous minutes of the Board meetings at the relevant and material times showed that there was in fact a dire
F cash-flow problem in the plaintiff and a need to raise funds on an urgent basis. The minutes of Board meetings showed that the cash flow problems were not contrived as claimed by the plaintiff;

(ix) At the material time in 2009, the plaintiff and its subsidiaries were badly affected by the global economic crisis and the plaintiff for the
G first time was facing financial losses;

(x) The plaintiff's senior management, in particular, the person in charge of finances, Soon (who did not give evidence), failed to advice the Board that the second divestment would not have had the effect of
H alleviating the financial problems and immediate cash-flow needs of the plaintiff as desired;

(xi) The plaintiff's claims that the sale of the PEB shares, in particular, the third divestment, was a contrived sale was devoid of merit. Further, the plaintiff's pleaded case and claims that the first to third defendants
I had "masterminded" the sale to Shorefield despite the objections and reluctance of PW1 was baseless. The decision to undertake the third divestment was a "considered and collective decision" and supported by Soon;

(xii) The court, in concluding that the second and third divestments were in fact effected or transacted for a proper purpose, ie, *bona fide* in the best interests of the plaintiff in compliance with s. 132(1) of the Act 1965, applied the tests laid down in *Charterbridge Corpn Ltd v. Lloyds Bank Ltd* [1970] Ch 62, *Howard Smith Ltd v. Ampol Petroleum Ltd and Others* [1974] AC 821 and as set out in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Company Bhd & Anor and Other Appeals* [2012] 5 CLJ 169; [2012] 3 MLJ 616;

(xiii) With regard to the third divestment, the mode of sale of the PEB shares under the third divestment was ratified by the board of directors on 22 December 2009 and the actual disposal price was in fact higher than the mandated selling price which resulted in a profit for the plaintiff from the third divestment;

(xiv) There was no personal gain to the defendants as a consequence of the second divestment and the third divestment; and

(xv) The plaintiff ought to have called Soon as a witness and its failure to do so attracted the invoking of s. 114(g) Evidence Act 1950.

[42] In respect of the second divestment, the learned High Court Judge made specific findings as follows:

> The rationale for the Second Divestment, namely the need to meet the cash flow or liquidity problems of the Plaintiff, coupled with the demand from Shin Yang Shipyard for payment of the balance purchase price due for the vessel known as Petra Galaxy due to be delivered urgently to Shell to fulfil a contract valued at RM1.1 billion were all genuine concerns and were not 'contrived' reasons as suggested by the Plaintiff. In other words these matters were not fabricated or put up by the impugned directors with a view to facilitating the sale of the PEB shares to Shorefield Resources Sdn Bhd. and causing injury to the Plaintiff.

[43] Crucially, with regards to the third divestment, the learned High Court Judge found:

> With respect to the Third Divestment, it is the finding of this Court that none of the three impugned directors acted in breach of their duties. This is because they were advised by Soon Fook Kian and Shamsul Saad that the cash flow problem for the following twelve months, ie, 2010 would deteriorate and that the Plaintiff would face serious liquidity problems; The Board of directors of the Plaintiff including the three impugned directors collectively considered all other options and dismissed them after deliberation, concluding that the sale of the entirety of the Plaintiff's PEB shares was the only means of resolving the cash flow problem which was exacerbated by the fact that the Plaintiff had suffered its first loss in corporate history for that particular quarter.

A **Decision Of The Court Of Appeal**

[44] The plaintiff appealed to the Court of Appeal. The Court of Appeal allowed the plaintiff's appeal against the defendants and reversed the decision of the High Court. The appeal against the fourth defendant was, however, dismissed. The Court of Appeal found no evidence linking the fourth B defendant to any alleged conspiracy, and held that the ingredients of conspiracy had not been made out against the fourth defendant.

[45] In finding the defendants liable, the key findings of the Court of Appeal that are relevant to the present appeal were as follows. The shareholders' divestment mandate of the EGM provided a barometer as to C what the shareholders gauged as being the best interests of the plaintiff, and was determinant in examining the defendants' conduct to ascertain whether they breached s. 132(1) of the Act.

[46] The Court of Appeal relied on the Singapore High Court case of *Credit* D *Development Pte Ltd v. IMO Pte Ltd* [1993] 2 SLR 370 and held that a shareholders' resolution carried at a general meeting of the company amounted to "regulations" pursuant to the articles of association of a company. In this regard, the Court of Appeal held that the defendants as directors were obligated to comply with the terms of the shareholders' divestment mandate as if prescribed by the plaintiff's articles of association. E The Court of Appeal held that such regulations were made by way of extraordinary resolutions at the plaintiff's EGM and were regulations under art. 115 of the plaintiff's articles of association.

[47] The Court of Appeal further held that the purpose of the second F divestment could not be said to improve the liquidity position of the plaintiff.

[48] Further, it was held that the third divestment was not *bona fide* in the best interests of the plaintiff. In so doing, the Court of Appeal referred to the case of *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors* [1973] 1 LNS 105; [1974] 1 MLJ 220 which decided that shareholders by a majority G could decide what was in the best interests of a company.

[49] It was also held by the Court of Appeal that contrary to the findings of the High Court that there was no conspiracy to injure the plaintiff, there is, *inter alia*, an elaborate scheme to ensure that Shorefield acquired a controlling interest of PEB.

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[50] To complete the facts, in allowing the plaintiff's appeal the Court of Appeal made the following orders:

(i) A declaration that the first defendant, as the then executive chairman and/or director and/or chief executive officer of the plaintiff had I breached the fiduciary duties and/or statutory duties and/or duty of care and/or trust obligations to the plaintiff;

(ii) A declaration that the second defendant and/or third defendant, as the then directors of the plaintiff had breached the fiduciary duties and/or statutory duties and/or duty of care and/or trust obligations to the plaintiff;

(iii) A declaration that the divestment of 10,500,000 ordinary shares of par value RM0.50 each in PEB by the plaintiff to the seventh defendant was not *bona fide* and/or in the interests of the plaintiff and/or is otherwise a sham;

(iv) A declaration that the divestment of 48,800,000 ordinary shares of par value RM0.50 each in PEB by the plaintiff as conducted by the fifth defendant and/or sixth defendant was not *bona fide* and/or in the interests of the plaintiff; and

(v) Damages, general and aggravated and/or equitable, to be assessed by the High Court as against the defendants.

The Questions Of Law On Appeal To The Federal Court

[51] As mentioned earlier in this judgment, the defendants subsequently filed a motion in the Federal Court for leave to appeal against the whole decision of the Court of Appeal. This court allowed leave to appeal on a total of 18 questions of law. For the sake of completeness we reproduce the leave questions, which could be divided into the following five categories of law:

1. **Division of Powers Between General Meeting Of Shareholders and Directors**

   (i) Whether the powers of management conferred on directors by the Act and the articles of association of a company governed by Table A can be overridden by an ordinary resolution passed by a simple majority of shareholders at a general meeting? (Question 1)

   (ii) Whether the Court of Appeal has stated the law correctly as regards the division of powers between the general meeting and the board of directors when it declared that 'the classical position … has been varied by legislation, for instance s. 132(1) of the Act'; as regards the previous position that shareholders by ordinary resolution in general meeting cannot impose their will upon the directors? (Question 2)

   (iii) Whether the reading of the new s. 132(1) of the Act by the Court of Appeal in the present case is correct in the light of the previous pronouncement by the Court of Appeal in *Pioneer Haven Sdn. Bhd. v. Ho Hup Construction Co. Bhd.* [2012] 5 CLJ 169; [2012] 3 MLJ 616 at p. 216 (CLJ); p. 654 (MLJ) that 'for all intents and purposes' the scope of the directors' duties under the old s. 132(1) and the new s. 132(1) 'are the same'? (Question 3)

(iv) Whether the true position under the changes by Act A1299 amending the Act as regards powers of shareholders on the one hand and that of directors on the other, is as declared in new s. 131B that the business of the company 'must be managed by or under the directions of the board of directors', and further by s. 132(1B) that vests 'business judgment' with the directors? (Question 4)

(v) Whether the *ratio* in the Singapore case of *Credit Development Pte Ltd v. IMO Pte Ltd (supra)* on powers of shareholders in general meeting over the board of directors, adopted by the Court of Appeal in the present case, is correct in the light of the Malaysian statutory provisions and case law? (Question 5)

(vi) Whether the Court of Appeal had acted correctly in law in holding that the words "regulations" in art. 115 of the plaintiff's articles of association (taken from art. 73 of Table A) refer to "resolutions" passed at a general meeting, and reversing the High Court on that question? (Question 6)

(vii) Whether the board of directors of a company who has been duly authorised by a resolution passed in a general meeting that approved the sale of shares may thereafter act in its best judgment in the interests of the company in the implementation of the resolution? (Question 7)

2. **The Test for Breach of Duty of a Director and Acting in the Best Interest of the Company**

(viii) Whether the Court of Appeal is correct in law when it adverted to the proposition that 'the "best interests of the company" is for the majority to decide' in the light of the *Charterbridge Principle (Charterbridge Corpn Ltd v. Lloyds Bank Ltd* [1970] Ch 62, 74), adopted by the Court of Appeal in the *Pioneer Haven Sdn. Bhd. v. Ho Hup Construction Co. Bhd (supra)* that the test is what a reasonable Board could consider to be within the interests of the company? (Question 8)

(ix) Is the statutory business judgment rule as provided under s. 132(1B) of the Act that as stated in *Howard Smith Ltd v. Ampol Ltd* [1974] AC 821? (Question 9)

(x) Can shareholders determine or dictate what is in 'the best interest of the company' by passing an ordinary resolution by a simple majority in general meeting in the context of determining the conduct of a director, pursuant to s. 132 of the Act? (Question 10)

(xi) Whether the principle adopted by the former Supreme Court in *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors (supra)* that 'what is beneficial to the company as a whole is usually for the shareholders to decide' is any longer applicable in deciding whether a director has acted 'in the best interest of a company' pursuant to the changes by the new s. 131B and s. 132 of the Act? (Question 11)

(xii) Whether in determining if a director had acted 'in the best interest of the company' the director is bound to take into account and apply the majority view of the shareholders as displayed by the passing of an ordinary resolution in general meeting? (Question 12)

3. **Conspiracy To Injure**

(xiii) Whether in the context of corporations law, a finding of conspiracy to injure on the part of the board of directors of a company can be made in the absence of common intent or actual injury to the company? (Question 13)

(xiv) Whether the law of conspiracy could apply to a collective decision of the board of directors of a company making a commercial decision? (Question 14)

4. Section 354 of the Act

(xv) Whether the Court of Appeal erred in failing to consider the application of s. 354 of the Act in the absence of any finding of a personal gain by the concerned directors of the matters complained of? (Question 15)

5. Distinction between Executive and Non-Executive Directors

(xvi) Whether a distinction should be drawn between executive and non-executive directors in circumstances where non-executive directors have limited management functions and played a limited role in executing the impugned decisions made collectively by the board of directors? (Question 16)

(xvii) In regard to alleged breaches of fiduciary duties and in cases of collective decision-making by the Board, whether the same yardstick is applicable to executive directors in management and non-executive directors not in management? (Question 17)

(xviii) Whether a finding that the board of directors ("Board") of a company had acted against the interest of a company can *ipso facto* lead to a finding of conspiracy by the Board against the company? (Question 18)

[52] It must be noted that this court granted leave to appeal to the first, second and third defendants to appeal on the legal issues posed under Questions 1-15. Specifically for the second and third defendants, this court allowed the legal issues posed under Questions 16-18.

The Dominant Purpose Of Selling The PEB Shares

[53] Before turning to the legal questions posed in the present appeals, it is very important that at the very outset we should deal with the pivotal issue that revolves around the following primary factual question: Why did the Board of the plaintiff undertake the sale of the PEB shares in the second divestment and third divestment? This was one of the central issues in the proceedings in the courts below. The answer to the pivotal question is crucial when we consider the approved leave questions. In the final analysis, the potential liability of the defendants, to a large extent, turns on the resolution of the pivotal question.

[54] The defendants' case in principle was that the divestments were undertaken pursuant to a genuine need to address urgent cash flow problems caused by a downturn in business of the plaintiff. On the other hand, the plaintiff took the position that the cash-flow problem was not genuine. It was a material part of the plaintiff's case that the ulterior motive was not to resolve any cashflow problem but to dispose off PEB to Shorefield under a conspiracy contrived by the defendants.

[55] Put simply, it was either a genuine cash-flow problem warranting the divestments to create liquidity or a conspiracy to divest the PEB shares to Shorefield. It was one or the other. The question is one of evidence. To a very large extent, the determination of this primary fact involved an assessment and evaluation of the credibility of the oral and documentary evidence presented by all parties at the trial.

[56] As we have seen earlier, the courts below came to different findings.

[57] Principally, the learned High Court Judge held that the plaintiff was faced with acute cash-flow problems and high-geared borrowings that justified the sale of the said shares to restore its liquidity condition and that the defendants acted in the best interest of the plaintiff.

[58] The Court of Appeal, on the other hand, took a contrary view. In essence, it held that the defendants acted in bad faith and engaged in an elaborate scheme or conspiracy to pass the shares in PEB to Shorefield.

[59] In the circumstances, one of the key questions for us to determine is which of the courts below came to the right decision. To answer this, we have to carefully scrutinise the evidence and the judgments of both courts.

[60] Before us, learned counsel for the plaintiff strongly contended that these two divestments were executed by the defendants based on contrived and false reasons that resulted in the plaintiff's 64.62% stake in PEB being reduced to only 29.59% and in the plaintiff ceasing to be the controlling or even the largest shareholder in PEB. His contentions could be summarised as follows. The divestments were in favour of Shorefield, a company controlled by one Datuk Bustari, who was linked to the first defendant; Shorefield became the largest and controlling shareholder of PEB but had not to make a mandatory general offer as its shareholding did not breach the 33% trigger. The second and third divestments were in breach of the terms of an express shareholders' divestment mandate of the plaintiff which was given at an EGM in conjunction with the approval for listing of PEB to sell only up to 10% of the plaintiff's 64.62% stake (thereby leaving not less than 54.62%) as well as two subsequent AGMs (by way of renewal). The third divestment was also in breach of an express Board mandate given at a Board meeting on 18 November 2009 as the remaining 54.62% of PEB shares should be sold *en bloc*. An *en bloc* sale would have required the purchaser to mount a mandatory general offer and for the sale to be put to shareholders of the plaintiff for approval under s. 132C of the Act. Both these requirements were evaded when the defendants sold in tranches to Shorefield. He went on to say that in causing the plaintiff to undertake the second and third divestments, the defendants were not acting in the best interests of the plaintiff. The defendants acted in breach of their fiduciary, statutory and common law duties as directors of the plaintiff with the purpose of divesting a controlling block of PEB shares to Shorefield. In short, according to learned counsel, the sales were obviously "cooked-up" to justify the quick sale to Shorefield.

[61] We find ourselves unpersuaded by learned counsel's contentions. There are several reasons why we find these arguments unsustainable. In the first place, it is material to point out that in determining the dominant purpose of the second and third divestments, the learned High Court Judge placed reliance on the contemporaneous documents, including the board of directors' minutes; the learned High Court Judge did not rely solely on oral evidence on the pivotal question.

[62] A scrutiny of the contemporaneous documents on record revealed that the decisions to sell the PEB shares were made, collectively and unanimously, at all material times by all members of the board of directors of the plaintiff present at the Board meetings concerned. The evidence was compelling. These documents also disclosed the Board of the plaintiff, including the defendants, had at all material times relied on the advice of senior management of the plaintiff and professional advisers in arriving at the decisions to sell the PEB shares. These were important documents that the Court of Appeal failed to consider when deciding the key issue of the dominant purpose of the divestments of the PEB shares. In this regard, the learned High Court Judge thus explained the importance of the contemporaneous Board's minutes:

A This is necessary because, in order for the Court to assess and adjudicate upon the directors' real purpose or rationale for deciding to sell the shares in PEB during the latter half of 2009, consideration will have to be given to the chronology of events and the state of affairs of the Plaintiff both prior to and during the period when these transactions were undertaken. In this context, the most useful available and objective evidence comprises
B the minutes of meetings of the board of directors during this period. The minutes of meetings relied upon are all confirmed as correct by the Chairman as well as the rest of the directors, and as such comprise evidence of the proceedings and resolutions arrived at those meetings, unless the contrary is proven.

C **[63]** A point to note in this case is that substantial relevant evidence was reduced to writing. As observed by the learned High Court Judge, "the minutes form a valuable and objective study of the proceedings of the plaintiff at the material time. Matters as encompassed in the minutes of meeting, in conjunction with these other documented events, are therefore
D directly relevant and assist the court to ascertain the rationale or purpose underlying the decision to sell the subject PEB shares *vide* the second and third divestments". One could see the force of the learned High Court Judge's reasoning. Given that this was a "document-heavy dispute", the learned High Court Judge was entitled to make her decision, among others, based on those contemporaneous documentary evidence produced at the trial (see *Len Min*
E *Kong v. United Malayan Banking Corp Bhd & Another Appeal* [1998] 2 CLJ 879; [1998] 2 MLJ 478, *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037). In our judgment, the learned High Court Judge was properly guided by these
F principles and we find no error in her reasoning.

[64] It also bears noting that the learned High Court Judge also heard a tape recording that was tendered by the plaintiff of a crucial Board meeting on 18 November 2009 (pertaining to the third divestment). This was ever more important where the learned High Court Judge found that the recording did
G not at all match the plaintiff's version of events as narrated by PW1 in his testimony. PW1 was the plaintiff's principal witness to prove a conspiracy to sell PEB shares and to dispute the defendants' case that the sale of the PEB shares was necessary to resolve the cash-flow problems. Instead the tape recording revealed that the decision to sell the remaining PEB shares held by
H the plaintiff was reached after careful consideration of various options to raise funds and long deliberations. PW1, who was one of the directors of the plaintiff at the material time, gave approval to the sale but later sought to deny it at trial. The Court of Appeal should have directed its mind to this tape recording evidence when testing the credibility of PW1. The Court of
I Appeal missed this important evidence and did not judicially appreciate that significant evidence on record.

[65] On what constitutes judicial appreciation, we refer to the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, where the Court of Appeal said:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[66] It is not without significance to bear in mind that PW1 himself took part in making the collective decisions complained of by the plaintiff. On this important issue, the High Court made the following important findings:

> The audio recording of the meeting of 18 November 2009, which I heard in its entirety is otherwise than as represented by Shamsul. It is evident after hearing the audio recording which is consonant with the minutes of the meeting, that contrary to what Shamsul stated under oath in Court, he had in fact fully supported and agreed with the decision made by the Board collectively, that it had no option but to sell the entirety of the PEB shares to meet the Plaintiff's austere cash flow problem. At no point in time during the meeting did Shamsul express reluctance, far less object to the proposal. The audio recording which provides contemporaneous proof of what was said in the meeting and which was introduced into evidence by the Plaintiff, discloses that Shamsul was entirely in agreement with the views of the Board, after presentations had been made by both himself in relation to operations and Soon Fook Kian in relation to cash flow simulations. The matter of cash flow had to be dealt with urgently in view of the losses suffered by the Plaintiff for the first time in its corporate history.

[67] We entirely agree with all the reasons given by the learned High Court Judge. Indeed, the learned High Court Judge had in mind and was guided by the correct principles in testing the veracity of oral evidence by reference to the contemporary documentary evidence and the probabilities of the case. As explained by Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, "For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version

of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity". (See also *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453).

[68] The learned High Court Judge also highlighted numerous instances of inconsistencies and lack of probity in the evidence of PW1. The learned High Court Judge also, upon evaluation of the evidence of PW1, found that PW1 was "less than candid", was an "unreliable witness", "misleading", "deliberately unhelpful" and "evasive in the course of cross-examination", among others. It was the conclusion of the High Court that PW1 was an untruthful and misleading witness. At another place of her judgment, the learned High Court Judge observed:

> When all of this evidence is considered it is clear that Shamsul's evidence in Court on this issue, particularly examination in chief, was unreliable and misleading. In fact the brevity of his evidence on the discussion of matters on 18 November 2009 appears to amount to a deliberate attempt to conceal/suppress salient and significant matters. In this context I refer to the extensive discussion of the cash flow problem as evidenced by both the minutes of 18 November 2009 as well as the audio tape recording of 18 November 2009.

[69] The learned High Court Judge's finding and conclusion was based on the veracity of PW1 who testified before her. In the assessment of witnesses for either side, the settled principle is that a trial court is entitled to evaluate the credibility of the witness and determine if one set of witnesses is to be believed in preference to the other; unless the trial court has misdirected itself on the evidence, the fact that the trial court has the advantage of seeing and observing the witnesses would be given great weight.

[70] In cases such as the present, an appellate court has to take into account the advantages enjoyed by the trial court in hearing and seeing the witnesses. In *Watt (or Thomas) v. Thomas* [1947] AC 484, Lord Thankerton said, "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion". (See also Privy Council in *Choo Ah Pat v. Chow Yee Wah & Anor* [1971] 1 LNS 22; [1974] 1 MLJ 62, PC, *Lee Soh Hua v. Kow Lup Piow & Ors* [1984] 2 CLJ 85; [1984] 1 CLJ (Rep) 191; [1984] 2 MLJ 101 and also *Ming Holdings (M) Sdn Bhd v. Yusof Latif Holdings (M) Sdn Bhd* [2006] 3 CLJ 72; [2006] 4 MLJ 189).

[71] In the instant case, the learned High Court Judge was perfectly entitled to weigh and evaluate the credibility of PW1 and to conclude that PW1 was an untruthful witness. As such, the integrity and veracity of PW1 was doubtful. A fundamental error by the Court of Appeal was to ignore the established principle. The Court of Appeal had not shown how and where the learned High Court Judge erred in her findings of fact and applied wrong principles of law, if any.

[72] The High Court also took into account the role played by the plaintiff's senior management, in particular the person in charge of finances, Soon, who advised the board of directors that the plaintiff's cash flow as 'very tight' and that the plaintiff had no surplus cash to pay its financial obligations. It was the finding of the learned High Court Judge that the operations and day-to-day running of the plaintiff required significant input from Soon, the then finance manager of the plaintiff.

[73] In point of fact, as found by the High Court from the Board minutes of 18 November 2009 and the audio-recording that the trial judge personally heard, Soon gave projected analysis of the plaintiff's position on the sales of all the PEB shares. This was what the learned High Court Judge concluded:

> 117. Tengku Ibrahim then summarised the position by stating that it appeared that the sale of the PEB shares appeared to be the best option. All of the Board members, including Shamsul agreed in principle to the sale of the entirety of the PEB shares. It is significant and pertinent that Mr. Soon supported this proposed course of action by highlighting that the objective would be defeated if the Plaintiff only chose to sell 30% or 40% of the Plaintiff's holdings in PEB shares.

[74] Despite Soon's prominent role, still the plaintiff did not call him as a witness to support its case of the defendants' conspiracy to dispose of the PEB shares as opposed to a sale to alleviate the plaintiff's cash-flow problem. In the circumstances, the learned High Court Judge found that if Soon had been called as a witness, his evidence would have been detrimental to the plaintiff's case. The learned High Court Judge concluded:

> Given these circumstances, the failure to call such a material and key witness can only warrant the irresistible inference that Soon Fook Kian's evidence, if he had been called, would have been detrimental to the Plaintiff's case. As such, this Court takes the view that this is a fit and proper case to invoke section 114(g) of the Evidence Act 1950, and hereby does so.
>
> 249. It is for the Plaintiff and not the Defendants to call Soon Fook Kian because it is the Plaintiff who alleges, contrary to the documentary evidence available in the form of the objective minutes of meetings, that the cash flow problem was a sham or contrived. The onus of establishing that the cash flow problem was a sham or contrived therefore fell upon the Plaintiff, not the Defendants.

[75] Given the key role that Soon played in advising the Board of its financial position and of the options available to resolve its cash flow problems, we accept that the learned High Court Judge had little choice but to draw an adverse inference against the plaintiff as the onus of establishing the plaintiff's case on conspiracy and that the cash flow problem of the plaintiff was a sham, fell upon the plaintiff.

[76] The statutory basis for the drawing of an adverse inference is s. 114(g) of the Evidence Act 1950 which provides that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. As such, the learned High Court Judge was wholly justified to conclude that if Soon had been called as a witness, his evidence would have been detrimental to the plaintiff's case.

[77] What is even more patent is that in her judgment, the learned High Court Judge explicitly directed her mind to the plaintiff's case that the sale of the PEB shares were undertaken for the purpose of injuring the plaintiff and benefiting Shorefield in which Datuk Bustari was the principal shareholder, pursuant to a conspiracy hatched by the defendants. The learned High Court Judge's finding in respect of the issue of conspiracy was critical to the plaintiff's case.

[78] It must be noted that the only witness called by the plaintiff to establish its case on conspiracy was PW1, whom, as we have discussed earlier, the learned High Court Judge found unequivocally to be untruthful and evasive; thus his evidence could not be relied upon. The learned High Court Judge specifically found that his evidence certainly could not be relied upon to warrant a conclusion or inference that the defendants were 'scheming' to sell the shares to the detriment of the plaintiff. For that reason, as we pointed out earlier, Soon's absence as a witness was detrimental to the plaintiff's case of a conspiracy to divert the PEB shares to Shorefield and Datuk Bustari.

[79] The learned High Court Judge made it clear that upon perusal of the entire voluminous documents that were tendered in the trial and evaluation of the evidence of all the witnesses, she held that there was insufficient evidence to show that the dominant reason for the sales of the shares was to divert the shares to Shorefield. The High Court specifically rejected plaintiff's case that the defendants acted in bad faith or engaged in a scheme or conspiracy to pass the shares in PEB to Shorefield. In the words of the learned High Court Judge:

> When however the evidence is considered in its totality it appears to this Court that the Plaintiff has sought to piece together these various isolated events and suggest that cumulatively they show a conspiracy on the part of these directors in relation to the sale of the PEB shares. The Plaintiff has failed however to produce any independent evidence of this fact by for example calling salient witnesses such as Soon Fook Kian, Henry Kho, Francis Kho and Datuk Bustari Yusof. Instead the Plaintiff has produced

> what in effect is only one witness of fact whose credibility is very much in issue as I have stated throughout this judgment. The Plaintiff has sought to establish its case through the cross-examination of the impugned directors together with a piecing together of various circumstantial evidence, which is both unsatisfactory and untenable.

[80] In our opinion, there was failure on the part of the Court of Appeal to appreciate that the plaintiff's entire case of conspiracy rested on the premise that there was no real cash-flow problem and that the defendants created it. The High Court found as a fact on an exhaustive analysis of the evidence both oral and documentary that in 2009 the company faced a genuine cash-flow problem with only RM2 million in cash available necessitating the divestments to create liquidity. In view of the High Court's finding, the Court of Appeal should have concluded that the plaintiff's case, that there was no real cash-flow problem and that the defendants created it, must fail. The failure to appreciate the High Court's findings led the Court of Appeal into error.

[81] Another matter that must be noted is that the Court of Appeal made reference to the fact that there was some personal relationship between the first defendant and Datuk Bustari. This would appear to have influenced the decision of the Court of Appeal in reversing the findings of facts by the High Court. In our opinion, the alleged family connection was too remote to be of any significance. As aptly described by learned counsel for the first defendant, such a relationship "is tenuous at best". It was predicated on the marriage of an unidentified nephew of the first defendant to a family member of one Tan Sri Mohd Kamal. It happened that Tan Sri Mohd Kamal's son was married to Datuk Bustari's daughter. In this regard, it is also important to note that it was not shown that Tan Sri Mohd Kamal had any link or connection to the parties in dispute. None of these parties was called as witnesses in the trial. In the absence of immediate family members of the first defendant, like his own children, and Datuk Bustari being related by marriage, this allegation, in our opinion, could only be considered as something trivial.

[82] For that reason, it was wholly speculative of the Court of Appeal to conclude *via* a transaction of this nature involving legal and professional advisors that "Shorefield Resources was linked to the first defendant through Datuk Bustari".

[83] As to the point raised by learned counsel for the plaintiff that the third divestment was not disposed of *en bloc* as mandated by the directors' resolution, the first defendant in his testimony explained, which was accepted by the learned High Court Judge, that the disposal of the shares in two tranches was advised by Affin Investment Bank Berhad for commercial reasons to meet urgent liquidity needs and to obtain the minimum stated price. The PEB shares could not be sold *en bloc* due to poor market

A conditions at the material time. An *en bloc* sale of the plaintiff's entire PEB shareholding would not have been commercially viable as the same would have also triggered a general offer, and this could discourage potential buyers. An *en bloc* sale was also impractical, as PEB's main customer, Petronas, required certain Bumiputera quota to be met by PEB. Petronas was
B a major client of PEB and had in place a policy that it would only engage with companies with a Bumiputera majority shareholding. Moreover, an open tender sale could not have been done, as it would have been a tedious and costly process, hence defeating the purpose of raising cash on an urgent basis. For this reason, in our opinion, the point raised by learned counsel was
C not well founded.

[84] The essential point is that the learned High Court Judge found that the third divestment made a profit of RM13.7 million for the plaintiff. If the second tranche of shares had been sold, the plaintiff would have made a profit of RM103 million, which would have improved the cash flow position of the
D plaintiff until December 2010 as envisaged. The intended fourth divestment was scuttled by the *ex parte* injunction obtained by PW1 on his own, and such that the mandate could not be fully carried out by the first defendant. As observed by the learned High Court Judge, had the first defendant been able to carry out the mandate in its entirety, the plaintiff would have made a more
E significant profit. However, this was prevented by the injunction obtained by PW1.

[85] It is significant that the decision to sell the PEB shares was independently made by the directors after making an independent assessment of the professional advice. Prior to the third divestment, the following steps
F had been taken. Legal advice was sought from Messrs Chris Koh & Chew on 19 November 2009 pertaining to the mechanism to be undertaken for the entire disposal of the plaintiff's PEB shares and whether an immediate announcement was required; professional advice was sought from Affin Investment Bank on 20 November 2009 pertaining to methods to raise funds
G to alleviate the plaintiff's financial difficulties. Affin Investment Bank then advised that the same could be achieved *via* a one-time disposal of the plaintiff's entire shareholding in PEB or through a staggered disposal in two tranches; and professional advice was also received from TA Securities Holdings Bhd on 23 November 2009 who advised that the sale be conducted in two stages, ie, first involving shares which did not require shareholders'
H approval and secondly the remaining shares which would require such approval. There were also no evidence or even suggestion of collusion between the defendants and the professionals who advised them. In this connection, s. 132(1C) of the Act provides that a director, in exercising his duties as a director may rely on information, professional or expert advice,
I opinions, reports or statements.

[86] As to the findings of the Court of Appeal that PEB was the "jewel in the crown" of the plaintiff, based on the evidence on record, we agree with the submission of learned counsel for the second and third defendants that the term was an incorrect notion as PEB's 2009 and 2010 net profits had declined at an alarming rate since its listing in 2007. This could be seen from a perusal of PEB's annual reports for the years 2007 to 2010 wherein the profits declined from RM50.918 million in 2007, to RM42.64 million in 2008, to RM14.49 million in 2009, and to RM2.68 million in 2010. PEB only contributed a dividend income of approximately RM2.34 million (in contrast to the total contribution of approximately RM101 million and RM34.6 million from the core business of marine vessels charter of the plaintiff group) to the plaintiff for the financial year ending 2008 and 2009.

[87] We return to the pivotal question. How, then, did the Court of Appeal come to a different conclusion? The answer is that in reversing the findings of fact by the learned High Court Judge, the Court of Appeal held that the High Court failed to examine three factors: the loss of PEB as a subsidiary and its implications; the cash flow problems and that only the bank got paid; and that Shorefield benefited because of the alleged link to Datuk Bustari. The Court of Appeal justified appellate intervention in the following passages of its judgment:

> In our present case, the learned judge should have examined the conduct of the board of directors to determine whether they had satisfied the duty imposed on them in law in terms of their conduct that has been referred to in this case. We are of the view the board of the directors had failed to give consideration to the following facts:
>
> a) To consider and take into account that the Second and Third Divestment of shares in PEB led to the plaintiff ceasing to be the majority shareholder of PEB, which was a loss of substantial income for the plaintiff.
>
> b) To weigh the need to raise funds by sale of these PEB shares would not improve (at all) the liquidity position of the plaintiff. All it did was to settle the bondholders. On the other hand the plaintiff had lost a valuable investment in PEB as the plaintiff no longer controlled PEB.
>
> c) At the end of the day the beneficiary of the scheme referred to the aforesaid was Shorefield Resources which was linked to the 1st defendant through Dato' Bustari.
>
> In our view these are the factors that should have been considered by the court before it could hold that all these were done in the best interest of the plaintiff. To our mind, failure to do so, constitutes a misdirection in law and fact on the part of the learned trial Judge which warrants appellate intervention.

[88] Was the Court of Appeal correct in reversing the High Court based on the three factors? Before us, in responding to the contentions of learned counsel for the plaintiff that the above findings by the Court of Appeal were clearly justified and correct, learned counsel for the first defendant carefully took us through the lengthy judgment of the learned High Court Judge. He brought to our attention the relevant parts of the judgment of the High Court to show that as a matter of fact the High Court had examined the three factors adverted to by the Court of Appeal. He then contended that the Court of Appeal misapprehended the terms of the judgment of the High Court in arriving at the above conclusion.

[89] We accept the submission of learned counsel for the first defendant. We have read the judgment of the learned High Court Judge, in respect of which the material parts we have highlighted and discussed earlier. The Court of Appeal's findings to justify appellate intervention on the basis of the three factors were fundamentally incorrect. In our opinion, the Court of Appeal's finding was a mistaken reading of the judgment of the High Court. The criticism made by the Court of Appeal of the High Court was therefore not sustainable.

[90] Contrary to the findings of the Court of Appeal, the learned High Court Judge in her comprehensive judgment had sufficiently analysed and dealt with utmost care the conduct of the defendants and also every point raised by the plaintiff in support of its case, including the three factors, and rejected them largely on evidential grounds that it failed to make out its case of a conspiratorial scheme to sell-off the PEB shares.

[91] That being the case, the underlying basis for the Court of Appeal to justify its appellate intervention was wholly misconceived and untenable. This was a further fundamental error made by the Court of Appeal leading to its flawed finding that there was misdirection in law and fact on the part of the learned High Court Judge. It was this erroneous approach to the case that resulted in miscarriage of justice.

[92] The learned High Court Judge had performed her task commendably in undertaking an in-depth and careful analysis of all the issues leading to the divestments of PEB shares. The learned High Court Judge had carefully and anxiously considered the entirety of the evidence on this issue. The judgment of the learned High Court Judge revealed that after perusing with a fine toothcomb the voluminous documents tendered at the trial and evaluating the evidence of the witnesses, she concluded that there was no breach by the defendants of their directors' duties of the sale. The learned High Court Judge held that the main purpose of the sale of the PEB shares was to meet urgent liquidity needs of the plaintiff due to genuine cash flow problems that the plaintiff faced at the material time.

[93] On the facts of this case read as a whole, we could not agree more with the learned High Court Judge's conclusions on the above primary facts. We could not find any appealable error in her conclusions. In our judgment, the findings were clearly justified and correct based on the totality of the oral evidence read along with the contemporaneous documentary evidence led at trial before the High Court. We have, for that reason, reached the clear conclusion, first, that the second and third divestment of the PEB shares were undertaken to address genuine urgent cash flow problems caused by a downturn in business of the plaintiff, and secondly that there was no conspiracy contrived by the defendants to injure the plaintiff by the sale of the PEB shares.

[94] The law is clear and well-settled in that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911; and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453). This court has said this before, and we adhere to it now. Having regard to the above principle, we find that in the present case the Court of Appeal made no findings that the High Court had gone plainly wrong, let alone that on a reconsideration of the whole evidence the opposite conclusion should be reached.

[95] In *McGraddie v. McGraddie and Another* [2013] 1 WLR 2477, the United Kingdom Supreme Court held that an appellate court should not interfere with the trial court's conclusions on primary facts unless it was satisfied that the court was plainly wrong; that the reasons justifying that approach were not limited to the fact that the trial judge was in a privileged position to assess the credibility of witnesses' evidence, but also included the fact that trial judges possessed expertise in determining issues of fact, that duplication of the trial judge's efforts on appeal was undesirable.

[96] In *McGraddie*, the Supreme Court referred to the judgment of the majority of the Canadian Supreme Court in *Housen v. Nikolaisen* [2002] 2 SCR 235, which explained why appellate courts are not in a favourable position to assess and determine factual matters: "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole."

[97] Recently in *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it

was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached; and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[98] Coming back to the present case, the Court of Appeal did not undertake the appropriate review exercise and further, did not make the appropriate determination that the High Court had gone plainly wrong in its decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.

[99] The Court of Appeal had reversed the overall conclusions on primary facts of the learned High Court Judge without impeaching findings of fact by the High Court on the existence of a cash-flow problem in the plaintiff. The Court of Appeal did not impeach the learned High Court Judge's analysis of the evidence on the pivotal issue of "dominant purpose" and "conspiracy" and other critical matters in the dispute between the parties.

[100] The Court of Appeal failed to appreciate that as an appellate court it should not interfere with the learned High Court Judge's conclusions on primary facts unless it was satisfied that the learned High Court Judge was plainly wrong. The Court of Appeal erred in arriving at its conclusion without itself identifying why the High Court's findings were "plainly wrong" on the key issues of the genuineness of a cash-flow problem, of *bona fides*, or of a dominant purpose or an improper objective on the part of the defendants.

[101] In our opinion, a grave fundamental error made by the Court of Appeal was its failure to apply correctly the principles governing the review of findings of fact by appellate courts. This is in itself sufficient to warrant appellate interference on our part on this point.

[102] It is against this backdrop, that we now move on to deal with the questions posed in respect of which this court had granted leave earlier on. We will first deal with the legal issues arising from Questions 1 to 7 together. To a great degree, these questions raised the issue of the true nature of the relationship between the shareholders in general meeting and the board of directors.

Division Of Powers Between General Meeting And Directors

[103] A company is an artificial person and has no physical existence. Its legal existence is recognised only by reason of the Act. A company, not being a natural person, cannot act on its own; it can act only through the agency of natural persons. As stated by Cairns LJ in *Ferguson v. Wilson* [1866] LR 2 Ch. p. 89 "the company itself cannot act in its own person, for it has no

person". It is obviously fundamental therefore that somebody must manage it. Basically, the two organs of management of a company are the board of directors and the shareholders in general meeting. It would be theoretically and legally possible for the shareholders of a company in general meeting to exercise all the management powers of the company. General meetings are intended to be the means whereby the shareholders exercise control over the management. Collective decision making by the shareholders is voiced by and large through the exercise of their voting rights in general meeting of the company.

[104] Clearly in the modern corporate environment it would not be practicable for day-to-day management to be undertaken by the shareholders in general meeting. A company is a business enterprise. For all intents and purposes, a company is principally a vehicle for doing business with the aim to make profits. The commercial reality is that it would be excessively burdensome for the corporate decision-making process of a company to be made by resolutions of the shareholders in a general meeting. In practice, the Board's primary function is to manage or oversee the conduct and direction of the company's undertaking and business. But as a company grows in size, the Board will unavoidably have to delegate some of its management functions to others, such as professional employees.

[105] The Act provides that every registered company must have at least two directors. It also provides what powers are to be performed by the directors. The role and functions of directors have always been difficult to define. Generally, a director performs many roles to manage and direct the business of the company, including the role of an agent in the execution of transactions of sale of the company's assets. But as stated by *Ford's Principles of Corporations Law* (10th edn at p. 211), "Directors are accountable to members, in the sense that they are required to report to members and the members in general meeting have the power to remove them from office". It is to be noted that particular powers are vested in the general meeting under the Act. For examples: alteration of articles (s. 31), reduction of share capital (s. 64), and removal of directors of a public company (s. 128). In addition, there are specific powers vested in general meeting under Fourth Schedule 4 Table of the Act which a company may adopt; for instance: election of directors in place of those retiring (art. 66), and removal of directors, subject to s. 128 of the Act (art. 69).

[106] At first, as stated in *Foss v. Harbottle* [1843] 67 ER 189, shareholders as contributors of capital were referred to as 'proprietors assembled in general meetings'; shareholders were treated as the owners of the company. It was at that time arguable that shareholders had the ultimate control over all company matters and the director was then treated merely an agent of the company subject to the control of shareholders (see *The Principles of Modern Company Law* by LCB Gower, 3rd edn, at p. 136).

[107] Hence, in *Isle of Wight Railway Company v. Tahourdin* [1883] 25 Ch.D. 320 CA, the English Court of Appeal refused an application by the directors of a statutory company for an injunction to restrain the holding of a general meeting, one purpose of which was to appoint a committee to reorganise the management of the company. Cotton LJ said:

> It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is *intra vires* of the directors, is not for the benefit of the company.

[108] But things have changed since the landmark decision of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, where the House of Lords held that once legally incorporated, the company was an independent and separate person with its own rights and liabilities; shareholders are not the owner of the company but they own shares in the legal entity. Participation in the capital did not of itself confer any right to interfere in the management of the company.

[109] This new corporate model did not sit well with the notion of the 'proprietors assembled in general meetings'. Eventually, this led to the gradual erosion of the superior position of the 'proprietors' (see Pearlie MC Koh on *Company Law*, LexisNexis 2009 at p. 72). This was shown in a number of cases, which were cited by both learned counsel for the defendants.

[110] The starting point is the important 1906 case of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* [1906] 2 Ch. 34, CA, where the English Court of Appeal made the statement of principle that made it clear that the division of powers between the board of directors and the company in general meeting depended in the case of registered companies entirely on the construction of the articles of association and that, where powers had been vested in the Board, the general meeting could not interfere with their exercise. The directors ceased to be mere agents of the company. In that case, directors of a company refused to carry out a sale agreement to sell the assets of the company resolved upon by the company in general meeting because in their opinion it was not in the best interests of the company. The directors relied for support of their decision on the articles of association, which delegated to them all powers of management. The members argued that the articles were subject to the general rule that agents must obey the directions of their principals.

[111] The English Court of Appeal held that the resolution of the general meeting was a nullity and could be ignored; the articles constituted a contract between all the shareholders by which it was agreed that the directors alone should manage. It was further held that the shareholders could not compel the directors to sell the assets according to their wish:

> The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit. … It seems to me that if a majority of the shareholders can, on a matter which is vested in the directors, overrule the discretion of the directors, there might just as well be no provision at all in the articles as to the removal of the directors by special resolution. Moreover, pressed to its logical conclusion, the result would be that when a majority of the shareholders disagree with the policy of the directors, though they cannot remove the directors except by special resolution, they might carry on the whole of the business of the company as they pleased, and thus, though not be able to remove the directors, overrule every act which the board might otherwise do. It seems to me on the true construction of these articles that the management of the business and the control of the company are vested in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration of course, requiring a special resolution.

[112] That case was applied by the English Court of Appeal in *The Gramophone and Typewriter, Ltd. v. Stanley* [1908] 2 KB 89 where it examined the statement of principle made in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame (supra)*. In this case, G.T., Ltd was an English company, which held all the shares in a German company. For the purposes of income tax liability it became necessary to determine whether the English company's powers of voting in the directors of the German company gave the English company such control as would make the business of the German company that of the English company for the purposes of taxation.

[113] The English Court of Appeal held that the two businesses were in law distinct. On the contention that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directed, Buckley LJ explained:

> … this again is a misapprehension. This court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions

> even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involve a complete confusion of ideas.

[114] The same issue arose in *Quin & Axtens, Limited v. Salmon* [1909] 1 Ch 311, where it was accepted that where the relevant articles were in the normal form exemplified by successive Tables A, the general meeting could not interfere with a decision of the directors unless they were acting contrary to the provisions of the Companies Act 1862 or the articles. In this case, the memorandum of the company included among its objects the purchasing of personal property. By the articles the business was to be managed by the directors, but no resolution of the Board to purchase or lease any premises of the company was to be valid unless two conditions were satisfied, namely, notice in writing must be given to each of the two managing directors named in the articles, and neither of them must have dissented therefrom in writing before or at the meeting at which the resolution was to be passed. In August 1908, the Board passed resolutions for the purchase of certain premises by the company, and for the lease of part of the company's property. The plaintiff, who was one of the managing directors, dissented, but at an extraordinary general meeting of the company held in November 1908, resolutions similar to those passed by the Board were passed by an ordinary resolution of the members. The plaintiff brought this action for an injunction to stop the company from acting on the resolutions, as they were inconsistent with the articles. It was held that an injunction would be granted.

[115] The case of *John Shaw & Sons (Salford) Limited v. Peter Shaw and John Shaw* [1935] 2 KB 113, CA is equally important. In this case, a resolution of the general meeting disapproving the commencement of an action by the directors was held to be a nullity, Greer LJ expressed the new doctrine as follows:

> I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its power may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.

[116] Finally, in *Scott v. Scott* [1943] 1 All ER 582 it was held on the same grounds, that resolutions of a general meeting, which might be interpreted either as directions to pay an interim dividend or as instructions to make loans, were nullities. In either event, the relative powers had been delegated to the directors, and until those powers were taken away by an amendment of the articles, the members in general meeting could not interfere with their exercise. It was held that resolution in general meeting could not be used to control the directors in the management of the business of the company. As Lord Clauson said, "the professional view as to the control of the company in general meeting over the actions of directors has, over a period of years, undoubtedly varied".

[117] For the sake of completeness, we would also add that at common law there is a residual power on the part of the shareholders in general meetings to act when the Board is unable or unwilling to do so itself (see: *Corporate Law* by Hans Tjio, Pearlie Koh and Lee Pey Woan, (2015) at pp. 286 to 289, *Company Directors: Duties, Liabilities, and Remedies, Mortimore QC,* 2nd edn at paras 4.17 to 4.27 and *Farrar's Company Law* 4th edn at p. 365).

[118] To sum up, the modern view of the relationship between shareholders in the general meeting and the board of directors on matters pertaining to management powers of the company has been well summarised by *Stephen Bottomley's The Constitutional Corporation* at p. 82 as follows:

> Since the 1906 case of *Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cunninghame*, courts in the United Kingdom and Australia have accepted that where the board of directors is given exclusive powers to manage the corporation then neither individual members nor the general meeting may intervene in or dictate the exercise of that power. It follows from this that the board of directors is not simply the servant or agent of the general meeting. The board exercises an original grant of power. This point was made clear in the 1935 case of *John Shaw & Sons (Salford) Ltd v. Shaw.* In a blunt summation of the legal position, Greer LJ stated that:
>
> > If powers of management are vested in the directors, they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested … in the directors is by altering their [constitution], or … by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the [corporation' constitution is] vested in the directors any more than the directors can usurp the powers vested… in the general body of shareholders.

[119] Earlier, at p. 21, in discussing the grant of managerial power of the directors, the learned author said:

> Corporate law restricts the capacity of members to intervene in the directors' exercise of managerial powers. When a corporation confers general powers of management exclusively on its directors then the members have no power to intervene in the day-to-day exercise of that

power or to dictate the manner of its exercise. In the High Court of Australia, Barwick CJ (*Ashburton Oil NL v. Alpha Minerals NL* (1971) 123 CLR 614, 620) described the legal position this way:

> Directors who are minded to do something which in their honest view is for the benefit of the company are not to be restrained because a majority shareholder or shareholders holding a majority of shares in the company do not want the directors so to act.
>
> In other words, according to the legal model the board of directors is a decision-making organ that has relative autonomy from the general meeting of members.

[120] It is seen from the foregoing discussion that courts in other jurisdictions have consistently taken the view that shareholders in general meetings may not control the powers of management conferred by the articles of associations on a board of directors; they can only do so by altering the articles to take away the powers of the board of directors, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. Today this principle cannot be disputed. We respectfully agree and we would gratefully adopt this view.

[121] The present issue arose because the Court of Appeal did not conform to the above view. Further and in addition, as we shall see later, the new s. 131B that was inserted into the Act in 2007 provided a statutory clarification as to the management powers of the Board as the primary organ of a company.

[122] Now, the Court of Appeal, whilst acknowledging the case of *The Gramophone and Typewriter, Ltd. v. Stanley (supra)* and established authorities that we have earlier discussed, still held that legislation had varied the 'classical position' as explained by Buckley LJ. In the words of the Court of Appeal:

> However the 'classical position' as set out above has been varied by legislation, for instance section 132(1) of the CA; and it is our view that under certain given circumstances the shareholders would be empowered to seek that decision of the board be made justiciable when it was just to do so. In this case it is not the resolution of the board or the members in the EGM which is being challenged *per se* but the conduct of the directors in acting the way that they did in flagrant breach of the members' resolution and whether this constituted a breach under section 132(1) of the CA.

[123] Leaving the new s. 131B on one side for the moment, the above position taken by the Court of Appeal was a departure, which was inconsistent with the prevailing authorities that we have discussed earlier.

[124] In our judgment, the position taken by the Court of Appeal in the present case was erroneous in law in several respects. This approach eroded the clear division of powers between the management of a company by its

directors and the wishes of its shareholders. We agree with the submission of learned counsel for the first defendant that it dispossessed directors of their management control and functions under the articles of association and the Act and effectively re-distributed such control to shareholders. This incorrect approach was deployed to examine whether there was a breach of s. 132(1) of the Act on the part of the directors. In the event that the decision of the board of directors was inconsistent with the wishes of shareholders, it was mistakenly considered as a breach by the directors under s. 132(1).

[125] At a later stage of this judgment, we will further discuss s. 132(1) of the Act when we deal with the test for breach of duty as director and "best interest" of the company.

[126] At this juncture, it is appropriate we now refer to s. 131B that reads as follows:

> (1) The business and affairs of a company must be managed by, or under the direction of, the board of directors.
>
> (2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.

[127] Section 131B which was inserted into the Act in August 2007, created a new provision that has a significant and wide-ranging consequence, primarily on directors. The new provision expressly declared that the board of directors must manage the business and affairs of a company. It is necessary to look at the operative word of the provision. The Legislature advisedly used the word "must", which highlighted legislative recognition that the board of directors is the principal management organ of a company. It is interesting to note that s. 157A of Singapore Companies Act, which is equivalent to our s. 131B, provides that the business of a company shall be managed by or under the direction of the directors. In consequence, the statutory position in Malaysia is even stronger by s. 131B using the words the business and affairs of a company "must be managed" by the board of directors. As the authors of Woon & Hicks, "*The Companies Act of Malaysia: An Annotation*" (LexisNexis, 2012) at p. 210 observed, s. 131B "makes it mandatory for the business and affairs of a company to be managed by or under the directions of the directors". The word comes along with phrase 'the board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company' in sub-s. 2 of s. 131B. The provision was drafted in the widest possible terms; it encapsulated the fundamental principle of our company law that a company's power of management is reserved to its directors,

collectively called the board of directors and not its shareholders. It has to be noted that s. 211 of our new Companies Act 2016 provides that a Board 'shall' manage the business and affairs of the company. We shall say no more about the new provision as the appeals before us deal with s. 131B.

[128] In the appeals at hand, quite apart from s. 131B, the power of management of the defendants as directors, including the power of sale or disposal of the plaintiff's assets, were also expressed in art. 115(1), as derived from art. 73, Fourth Schedule 4 Table A of the Act and art. 115(2) of the plaintiff's articles of association as follows:

> 115(1) The business of the Company shall be managed by the directors who may exercise all such powers of the Company, and do on behalf of the Company all such acts as are within the scope of the Memorandum and Articles of Association of the Company and as are not, by the Act or by these regulations, required to be exercised the Company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.
>
> 115(2) Any sale or disposal by the directors of a substantial portion of the Company's main undertaking or property shall be subject to ratification by shareholders in general meeting.

[129] This article of association of the plaintiff, which served as its rule of internal management, sets out the precise powers and duties of its directors, subject to the overriding provisions of the law. It provided that the general power to manage the plaintiff vests in the board of directors. Significantly, it recognised that the board of directors is the primary organ of the plaintiff; directors are not mere agents of the company. The powers of management, including the disposal of the plaintiff's assets are vested within the board of directors with the following exceptions:

(a) The directors cannot exercise powers specifically provided to be exercised in general meeting;

(b) The directors' exercise of power is subject to "these regulations" and the Act; and

(c) The directors' exercise of power is subject to "such regulations" is may be prescribed by the plaintiff in general meeting provided "such regulations" are not inconsistent with "these regulations" and the Act.

[130] It is plain for us to see that in essence, it provided that the business of the plaintiff, shall be managed by the directors who may exercise all such powers of the company as are not, by the Act or by Table A regulations, required to be exercised by the company in general meeting. This power is,

nevertheless, subject to Table A regulations, to the provisions of the Act, and to such regulations, being not inconsistent with Table A regulations or provisions of the Act, as may be prescribed by the company in general meeting. However, no regulation made by the company in general meeting can invalidate any prior act of the directors, which would have been valid if that regulation had not been made.

[131] In the context of the present case, the point to highlight is that the directors of the plaintiff who exercise the authority and powers conferred by the article must act as a Board and their acts are considered the acts of the company rather than the personal acts of individual directors of the plaintiff.

[132] It therefore follows that the powers of management of the plaintiff, including the disposal of the plaintiff's assets, are vested with the board of directors. Nevertheless, if such disposal amounts to a substantial portion of the plaintiff's property, the directors may proceed with the sale subject to subsequent ratification by the shareholders in general meeting.

[133] At this stage it would be appropriate to provide a summary of the powers of management of the directors of the plaintiff. Business management control of the plaintiff resides with its directors and not its shareholders. It is clear on principle and on authority that, provided that the act is within the powers delegated to the directors, the shareholders of the plaintiff in general meeting cannot interfere with or override management decisions its board of directors, even if all shareholders agree.

[134] In this connection, one of the central submissions of learned counsel for the plaintiff in opposing these appeals was that pursuant to art. 115(1) the board of directors could not decide anything contrary to the shareholders' divestment mandate. He further argued that the defendants as directors of the plaintiff were completely bound to divest the PEB shares only pursuant to the shareholders' divestment mandate. He argued that the first and second divestments were in breach of the terms of the express shareholders' divestment mandate, which the directors specifically sought and obtained from the shareholders at the EGM.

[135] It was further argued that the directors could not rely on powers vested on them pursuant to the plaintiff's articles of association and the provisions of the Act to sell the PEB shares. Learned counsel for the plaintiff then argued that the Court of Appeal was correct in holding that a shareholders' resolution, such as the shareholders' divestment mandate, carried at general meeting of the plaintiff amounted to "regulations" pursuant to its articles of association. We are not persuaded by this line of argument.

[136] The present controversy arose because the Court of Appeal held the mistaken impression that the directors' broad powers of management were subject to shareholders' supervision and that a decision by the directors to dispose of the company's shares in PEB could be overridden by a resolution of the members and that the directors were obliged to follow the will of the members.

[137] In this, it is important to note that the Court of Appeal was persuaded by the Singapore High Court in *Credit Development Pte Ltd v. IMO Pte Ltd (supra)*, which held to the effect that powers vested in directors under the general empowering provision were subject to control by ordinary resolutions of shareholders at general meeting. The Court of Appeal relied on *Credit Development Pte Ltd v. IMO Pte Ltd (supra)* and held that a shareholders' resolution carried at a general meeting of the company amounted to "regulations" pursuant to the articles of association of a company and was binding on the directors.

[138] In *Credit Development Pte Ltd v. IMO Pte Ltd (supra),* the issue was whether the shareholders had the power to pass resolutions to appoint accountants and solicitors to investigate the affairs of the company. The High Court held that this was a matter of interpreting the company's articles. Amongst others, the cases of *Thomas Logan Ltd v. Davis* (1911) 104 LT 914 and *Marshalls Valve Gear Co v. Manning Wardle & Co Ltd* [1909] 1 Ch. 267 were cited in support while the cases of *Automatic Self-Cleansing Machine Filter Syndicate Co Ltd v Cuninghame (supra)*, *Quin & Axtens Ltd v. Salmon (supra), John Shaw & Sons (Salford) Ltd v. Shaw (supra)*, and *Scott v. Scott (supra)*, were distinguished on the basis that these cases did not construe the words in question or that the articles involved in those cases had specific provisions dealing with the subject matter which formed the basis of the resolution in those actions.

[139] On this basis, the Singapore High Court found that the shareholders did have such a power. The High Court observed:

> When such resolutions are passed, what the company in general meeting is saying to the directors is 'Appoint accountants and solicitors for these specific purposes. Subject to that you manage the company's business and exercise all the company's powers'.

[140] Based on *Credit Development Pte Ltd v. IMO Pte Ltd (supra),* the Court of Appeal in our present case held that the Board's mandate could not override the shareholder's divestment mandate. The Court of Appeal explained as follows:

> As been prescribed by the plaintiff's articles of association by virtue of Art. 115 ie, "… being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meeting", the terms that were provided by the Shareholders' Mandate during the EGM are the regulations that have been prescribed by passing resolutions and thus the directors must comply with the mandate as prescribed by the company's articles of association.
>
> The shareholders' mandate was subsequently renewed by the Shareholders' during the plaintiff's annual general meeting held on 26.6.2008 and 25.6.2009 respectively. Therefore, the alleged Board's Mandate could not override the specific authority of the Shareholders' Mandate.'

Elsewhere in its judgment, the Court of Appeal observed:

> The rationale for the Shareholder's Divestment Mandate was to enable the plaintiff to effect the divestment of 19.5 million ordinary shares in PEB (representing 10% of PEB's shareholding) or any part thereof at the opportune time in the event of improving equity market conditions and to eliminate the need to convene separate general meetings whenever applicable to obtain shareholders' approval for the divestment of such shares. The Shareholder's Divestment Mandate would enable the plaintiff to raise additional funds expeditiously as and when it was required without having to obtain approval at a General Meeting.
>
> In this case the regulatory aspect of the same were the mode of selling and that the divesting of the plaintiff's shares in PEB would not exceed 10%. These regulations were made by way of extraordinary resolutions at the EGM, so they would constitute regulations under article 115 and we therefore are not in agreement with the learned judge on the point.

[141] We have five observations to make concerning the above passage. The first is that the articles of association of a company are the regulations governing the internal management and the operations of the company; the articles prescribe the regulations binding on its shareholders (see *Allan v. Gold Reefs of West Africa Limited* [1900] 1 Ch. 656). The second is that art. 72 of the plaintiff's article of association employs the word "resolution" rather than "regulation" in relation to the decision of the members in a general meeting. "Regulation" therefore refers to a provision in or of the articles. The third is that the articles of a company should be regarded as a business document and should be construed so as to give them business efficacy (see *Holmes v. Keys* [1959] Ch 199 CA). The fourth observation is that art. 115(1) of the plaintiff's articles of association adopt art. 73 under Fourth Schedule 4 Table A of the Companies Act 1965. Table A is called "Regulations for Management of A Company Limited by Shares". Section 4 of the Act expressly provides that "regulation" means a regulation under the Act. The fifth observation is that by s. 30(2) it is clear that "regulations" refer to the regulations contained in Table A and cannot as held by the Court of Appeal, refer to a resolution passed by shareholders which could vary from time to time.

[142] We reject the contentions of learned counsel for the plaintiff. We agree with the learned High Court Judge that "the general shareholders' mandate is not a 'regulation' within the meaning of art. 115 and cannot limit the existing power of the directors as provided under art. 115. Put another way, the reference in art. 115 to 'regulations' therefore means regulations as envisaged under the Companies Act, and not resolutions passed in general meeting". In our judgment, the limiting words 'subject to regulations … as may be prescribed by the company in general meeting" in art. 115(1) of the plaintiff's articles of association do not confer upon the plaintiff's shareholders in general meeting a general supervisory power over the directors whether in respect of their specific or general powers or both. The article in question confers wide power in the hands of the board because the word "regulations" has the same meaning as the word "articles" such that if shareholders want to interfere whether in respect of specific or general powers, they can only do so by altering the articles to take away the powers of the plaintiff's board of directors and this can only be done by a special resolution pursuant to s. 31(1) of the Act and art. 2 of the plaintiff's article of association that provide that articles of association may be amended by special resolution from time to time with the written consent of the Kuala Lumpur Stock Exchange and any other stock exchange on which the shares of the plaintiff may be listed at the time. In the context of art. 115(1) of the plaintiff's article of associations, we agree with the views of Loh Siew Cheang "*Corporate Powers: Accountability*" (2nd edn) at p. 146 that the preponderance of judicial opinion is against any form of supervisory control by shareholders in general meeting over directors' specific as well as general powers.

[143] This conclusion is in accord with the principles derived from the cases that we have discussed earlier, in particular *Quin & Axtens, Limited And Others v. Salmon* [1909] AC 442 where Lord Loreburn in delivering the judgment of the House of Lords said, "The only question of substance to my mind is the third contention of Mr Upjohn, when he said that the word "regulations" as employed in the 75th article includes at all events, if it is not equivalent to, directions whether general or particular as to the transaction of the business of the company. Now it may be a question for argument, but for my own part I should require a great deal of argument to satisfy me that the word "regulations" in this article does not mean the same thing as articles, having regard to the language of the first of these articles of association". It is pertinent to note that the article which Lord Loreburn referred to provided that the business of the company was to be managed by the directors, who might exercise all the powers of the company "subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting". As we can see, the terms of the said article is significantly similar to the relevant part of art. 115(1) of the plaintiff's article of association in our present case.

[144] In the same vein Greer LJ in *John Shaw & Sons (Salford) Ltd v. Peter Shaw (supra)* said, "I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the Chairman to instruct the company's solicitors not to proceed further with the action". In the same case, Slesser LJ said the words "regulations" has the same meaning as the word "articles". The learned judge explained:

> As to the third ground of want of authority, that the shareholders instructed the directors to discontinue the action on April 30, 1934: if the permanent directors had power under the articles to bring the action, I do not see how the shareholders could interfere with that power, otherwise than by altering the articles which they have not proposed to do. This would seem to be the effect of the decision of the House of Lords in *Quin & Axiens v. Salmon,* though the decision of Neville J. in *Marshall's Valve Gear Co.*'s Case is difficult to reconcile with that case. However, I do not think it necessary in the present circumstances to decide the point finally, but I incline to the view that article 95 in matters within the powers of the permanent directors would require an alteration of the regulations by special resolution to prevent this action continuing; *that is to say, that Lord Loreburn's dictum in Quin & Axtens' case is correct that the words "regulations" and "articles" in the articles in that case, which were substantially similar to the present article 95, mean the same thing*; see also *Logan v. Davis.*
>
> (emphasis added)

[145] This conclusion is supported by another point. In this, we agree with the submissions of both learned counsel for the defendants that the Court of Appeal failed to appreciate that *Credit Development Pte Ltd v. IMO Pte Ltd (supra)*, was clearly a departure from the preponderance of authorities on the principles on the division of powers between the board of directors and the shareholders in general meeting. Learned counsel for the defendants cited Loh Siew Cheang "*Corporate Powers: Accountability*" *(supra)* at pp. 146-148 who opined, and we agree, that the High Court in the *Credit Development* Case erred in distinguishing the cases of *Automatic Self-Cleansing Machine Filter Syndicate Co Ltd v. Cuninghame, Quin & Axtens Ltd v. Salmon, John Shaw & Sons (Salford) Ltd v. Peter Shaw and John Shaw* and *Scott v. Scott* as the said decisions concerned shareholders' resolutions which were inconsistent with the general provision which divided power between the Board and the general meeting and not the specific provision which further divided the powers of the Board between the directors themselves. In these cases, it was held that shareholders could not under the general provisions of management in the articles, pass resolutions to direct or manage the business of the company. It must be noted that the Court of Appeal did not take this distinguishing features into consideration.

[146] Learned counsel for the first defendant also cited *Walter Woon* on *Company Law* (3rd edn) at p. 357 where the writer observed there that the position taken in *Credit Development Pte Ltd v. IMO Pte Ltd (supra)* was also different from that in the United Kingdom which made it very much a stand-alone case.

[147] In our judgment, the Court of Appeal failed to see that the powers of management, including the sale of the plaintiff's shares in PEB, conferred on the plaintiff's directors by the Act and art. 115 of the plaintiff's articles of association cannot be overridden by an ordinary resolution passed by a simple majority of the plaintiff's shareholders at an extraordinary general meeting. It does not follow, and should not be assumed that ordinary resolution passed at the EGM, would constitute regulation under art. 115. We see no reason and justification to conclude that shareholders' resolutions carried at general meeting of the plaintiff were "regulations" pursuant to art. 115 of the plaintiff's articles of association.

[148] Based on the above, we hold that the Court of Appeal fell into error when it ruled that the terms that were provided by the Shareholders' Divestment Mandate during the EGM were the "regulations" prescribed, and thus the directors must comply with the mandate as prescribed by the company's articles of association.

[149] We conclude that a fundamental error made by the Court of Appeal was its holding that as directors, the defendants were obligated to comply with the terms of the Shareholders' Divestment Mandate of 26 April 2007.

[150] In our judgment, therefore, the Shareholders' Divestment Mandate did not deprive the plaintiff's board of directors of its power to deal with the plaintiff's shares in PEB in accordance with the Act and the plaintiff's articles of association.

[151] This brings us to the legal issues posed under Questions 8-12. These questions primarily relate to the position in law in relation to the duties of directors with reference to the specific legal issues that arose in instant appeals.

The Test For Breach Of Duty Of A Director And The Best Interest Of The Company

[152] As seen earlier, the defendants as directors of the plaintiff had wide powers of management. The powers came with serious duties and responsibilities. They were conferred upon the directors collectively as a board of directors. The extensive powers placed directors in a privileged position, which carried with it corresponding obligations and statutory duties that arose by reason of the attributes of the office imposed by the Act and under the common law and equitable rules.

[153] This is due to the need to protect shareholders and those who deal with the company from the negligence and misfeasance of errant directors as well as to protect investors from management excess. According to *Ford's Principles of Corporation Law (supra)* at p. 303, "Directors' duties must achieve a balance between keeping directors accountable to the interests of the company while allowing them discretion to make decisions which inevitably involve a degree of risk".

[154] Two provisions of the Act are relevant, and they provide a good starting point in addressing the legal issues posed under Questions 8-12.

[155] The first is s. 132(1), which sets out the statutory duties owed by a director to a company as follows:

> A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company;

The second provision is s. 132(1A) that reads:

> A director of a company shall exercise reasonable care, skill and diligence with:
>
> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities;
>
> and
>
> (b) any additional knowledge, skill and experience, which the director in fact has.

[156] These sections came into force *vide* Amendment Act A1299/07 on 15 August 2007, replacing the previous s. 132(1) which provided that directors shall at all time act honestly and use reasonable diligence in the discharge of the duties of his office.

[157] The new s. 132(1) of the Act codified the duties of the directors to act in the best interest of the company. What then is meant by "the best interest of the company"? The provision leaves open the scope of the phrase. It was Lord Greene MR in *Re Smith & Fawcett Limited* [1942] 1 Ch 304 who first said about the "interest of the company" in the context of the subjective aspect of the duty that required directors to exercise their powers honestly in what they believe, and not what a court may consider. In that case, the articles gave the directors an uncontrolled discretion to refuse to register a transfer. A, as executor of his father, claimed to be put on the register in respect of 4,001 shares held by his father. The directors refused to put A on the register unless he sold 2,000 shares to a director, in which case they would register A in respect of 2,001 shares. A challenged the refusal. The English Court of Appeal held that the refusal to register the transfer was allowed to stand. Lord Greene MR said, "They must exercise their discretion *bona fide* in what they consider-not what a court may consider-is in the interests of the company, and not for any collateral purpose".

[158] As stated by *Ford's Principles of Corporation Law (supra)* at p. 318, 'various entities could be considered to be part of "the company", namely existing members, future members, creditors, beneficiaries under a trust administered by the (trustee) company and employees, customers, contractors and the community'. The powers conferred on the directors must be exercised in the 'best interest of the company' and not for 'some private advantage or any purpose foreign to the power' (per Dixon J in *Mills v. Mills* (1938) 60 CLR 150).

[159] According to LS Sealy on *Cases and Materials in Company Law* (3rd edn, at p. 271), "the 'interests of the company' may not have the same meaning in all cases. It may refer to the interest of the corporate body as a separate entity or to those of the shareholders collectively, and in some cases the interests of the company as such may not be directly involved at all eg, in regard to the allocation of a surplus between different classes of shareholders. The application of a test based on 'the interests of the company' unnaturally assumes that directors' decisions are motivated by a single factor. The possibility that they may act from a combination of motives, or that the individual directors who support a resolution may be influenced by different considerations, is overlooked. In the case of mixed motives, therefore, the court's inquiry must go deeper, and endeavour to identify a dominant motive: this, in cases with similar facts, may lead to seemingly inconsistent results".

[160] Now, the Court of Appeal held that in determining whether a director acted in the "best interest" of a company under s. 132(1) of the Act, regard must be had as to whether the director had taken into consideration shareholders' resolution as this "provides a barometer as to what the shareholders gauge as being the best interest of the company. This would be relevant when the directors' conduct is put under the microscope to ascertain whether they had breached s. 132(1)".

[161] The Court of Appeal held that the shareholders' mandate at the EGM provided a barometer as to what the shareholders gauged as being the best interest of the company and was relevant in examining the directors' conduct to ascertain whether they had breached s. 132(1) of the Act. Thus, it was assumed by the Court of Appeal that acting in the "best interest of a company", would be a matter for the majority of the shareholders to decide.

[162] The present issue arose because the Court of Appeal adverted to the proposition that "the best interests of the company" was for the majority to decide by adopting the test in the 1974 case of *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors (supra)* wherein the Federal Court held as follows:

> The expression "*bona fide* for the benefit of the company as a whole" in the context stated would seem to mean something more than writing-off bad debts as in this case. **What is beneficial to the company as a whole is usually a matter for the shareholders to decide.** Largely it is a matter of opinion. Where opinions differ, as might well be the case here, the opinion of the majority must, of course, prevail. This is because the minority have by their contract with the company agreed to submit to the will of the majority. In the instant case and other similar cases it is not always easy to know as a fact whether or not a particular resolution is or is not *bona fide* for the benefit of the company as a whole in order to establish that it is a fraud on the minority. (emphasis added)

[163] Learned counsel for the defendants submitted that the Court of Appeal failed to appreciate that the case of *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors (supra)* was a decision made before the present changes came into being, namely ss. 131B to 132 of the Act. In our opinion, the inappropriateness of relying on that case is highlighted by the fact that the Court of Appeal failed to consider that *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors (supra)* was concerned with a case where a minority shareholder wanted to declare a resolution passed at a general meeting of a company to be null and void on the ground that it was *ultra vires* and was a fraud on the minority. The Federal Court held that the resolution was not a fraud on the minority and did not come within the exception to the *Foss v. Harbottle* principle.

[164] Thus, in this case, the Court of Appeal failed to appreciate that the Federal Court's pronouncement that it was for the majority to decide on what was for the benefit of a company must be read in the context of the facts in that case. In the context of the factual matrix of the Federal Court's case, it was held where there was difference of opinion between shareholders then the views of the majority might be taken to represent what was best for the company. This was not to say that in deciding whether a director acted in the best interest of a company under s. 132(1) of the Act regard must be had to resolutions passed by shareholders in general meeting.

[165] What then is the true test for breach of duty as a director to act in good faith and in the "best interest of the company"? The question is whether it is a subjective or objective test to judge whether directors acted in the best interest of the company. It is to this we now turn.

[166] In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company. In this regard, in *Corporate Law* by Hans Tjio, Pearlie Koh and Lee Pey Woan at p. 361, the learned authors said that the director's conduct is tested by reference to an essentially subjective barometer. The classic formulation of the subjective element in the test is

found, as we have discussed earlier at para. 157, in *Re Smith & Fawcett Ltd (supra)* in which Lord Greene MR said that "directors must exercise their discretion *bona fide* in what they consider-not what a court may consider-is in the interest of the company". The duty is to act in what the director believes, not what the court believes, to be the best interest of the company. The subjective nature of the test can be seen in *Regentcrest Plc (In Liquidation) v. Cohen* [2001] BCC 494 where Jonathan Parker J said:

> … the question whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. In an article entitled *Directors' Duty to Act in the Interests of the Company: Subjective or Objective*? [2015] JBL Issue 2, the writers said that courts have introduced objective elements into the duty to act in good faith and in the best interest of the company to address the problem identified by Browen LJ in *Hutton v. West Cork Railway Co* [1883] 23 Ch D 654 at 671 where the learned judge said:

> *Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational. The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company.

[168] The Singapore Court of Appeal in *Goh Chan Peng and three others v. Beyonics Technology Ltd and another* [2017] SGCA 40 explained the preferred approach which combines both subjective and objective tests as follows:

> Indeed, there are both subjective and objective element in the test. The subjective element lies in the court's consideration as to whether a director had exercised his discretion *bona fide* in what he considered (and not what the court considers) is in the interests of the company: *Re Smith & Fawcett Ltd* [1942] Ch 304 at 306, as accepted by this court in *Cheong Kim Hock v. Lin Securities (Pte) (in liquidation)* [1992] 1 SLR (R) 497 at 26 and in *Ho Kang Peng v. Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Ho Kang Peng*") at 37 Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.
>
> The objective element in the test relates to the court's supervision over directors who claim to have been genuinely acting to promote the company's interest even though, objectively, the transactions were not in the company's interests. The subjective belief of the directors cannot

> determine the issue: the court has to assess whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. This is the test set out in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] 1 Ch 62 (at 74) and it has been applied here since adopted by this court in *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 (at [28]).

[169] This brings us to the case of *Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd and Another (supra).* In that case, a property developer by the name of Pomeroy owned several companies through which various developments were carried out. These companies formed a group in that each one was owned by Pomeroy. The main company in the group, P. Ltd., was not the holding company of the other companies in the group but did coordinate their activities providing, amongst other things, finance and administration services. One of the companies in the group, Pomeroy Developments (Castleford) Ltd., held a long building lease of a piece of land at Castleford; this company gave a guarantee to Lloyds Bank in respect of a large overdraft owed to the bank by P. Ltd., the guarantee being secured by giving to the bank a first legal charge on the land at Castleford. The first paragraph of the objects clause of the memorandum of Pomeroy Developments (Castleford) Ltd., gave express power to enter into guarantees of obligations incurred by anyone who had an undertaking in which Pomeroy Developments (Castleford) Ltd., was concerned or interested. The Charterbridge Corporation, which was not within the group, entered into an agreement to buy the land at Castleford from Pomeroy Developments (Castleford) Ltd. but did not wish to take the land subject to the charge in favour of Lloyds Bank and sought to show that it was *ultra vires* and void.

[170] Charterbridge contended that the guarantee, and therefore the charge securing it, was *ultra vires* unless created for the benefit of Pomeroy Developments (Castleford) Ltd. and for the purposes of its business. It was alleged that the guarantee and charge were *ultra vires* because at the time when they were given, Pomeroy had not *bona fide* intended to further the interests of Castleford. The court held that this was irrelevant. In his judgment, Pennycuick J held:

> Mr. Pomeroy, in causing Castleford to enter into the guarantee, and, later on, the legal charge, was looking to the interests of the group as a whole. He considered it in the interest of the group as a whole that Castleford should enter into these transactions and that the other companies in the group should enter into comparable transactions. He did not, at the time of the transaction, take into consideration the interest of Castleford separately from that of the group. ...
>
> … As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr. Goulding contended that in the absence

> of separate consideration, they must, *ipso facto*, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, ie, unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be *ultra vires* and void, notwithstanding that the transaction might be beneficial to the company. Mr. Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. *The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.* (emphasis added)

[171] The last sentence of the above passage of the judgment that we have highlighted deserves particular consideration in the light of the decision of the Court of Appeal in our present case to the effect that the "interest of a company" was for majority of the shareholders to decide.

[172] One of the important principles of law that can be distilled from the case of *Charterbridge Corporation Ltd v. Lloyds Bank Ltd (supra)* was that the test for breach of duty of a director and acting in "the interest of the company" has an objective element: whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.

[173] This principle has come to be known as the "*Charterbridge* principle" (per Zainun Ali JCA (as Her Ladyship then was) in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor*). As correctly stated by Pearlie MC Koh on *Company Law (supra)*, at p. 112, it is an objective element in the test in the sense that this was done by reference to what an honest and intelligent man in the position of the directors would have done. Elsewhere at p. 301, the learned writer stated that "the tension between commercial reality and the requirements of the law is alleviated somewhat by the adoption of an objective formulation of the test for breach of directors' duty".

[174] The Singapore Court of Appeal in the case of *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 accepted Pennycuick J's formulation in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd (supra)*. The Singapore Court of Appeal in applying the objective element in the test had this to say:

> Counsel for the appellants relied on this *dicta* and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the part of the directors of the respondents, but were such that a reasonable man could have inferred that the transactions were entered into *bona fide* by the directors in the interests of the respondents. He

contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents. There was clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

[175] In *Spedley Securities Ltd (in liq.) v. Greater Pacific Investments Pty Ltd (in liq)* [1992] 7 ACSR 155, a "round robin" of transactions was effected by Mr. Yuill (a director of Spedley Securities Ltd (in liq) (Spedley)) and others, essentially with the purpose of "cleaning up" the balance sheet of Spedley. An action was brought to determine the validity of the various transactions. Cole J applied the objective element in the test as follows:

The test to be applied in considering the actions of Mr Yuill in effectively denuding GPIL of substantial assets by transferring them to GPl and P152 so that the funds could be returned ultimately to SSL and thus improve its balance sheet is that enunciated in *Charterbridge Corp Ltd v. Lloyds Bank Ltd* [1970] Ch 62 at 74: "As an intelligent and honest man in the position of a director of GPIL, do I, in the whole of the existing circumstances, reasonably believe that the transactions are for the benefit of GPIL.

[176] A principal error of the Court of Appeal in the present case was its failure to consider *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor (supra)*, which applied the objective element in the test. In delivering the judgment of the Court of Appeal, this was what Zainun Ali JCA (as Her Ladyship then was) said:

The prior provision of s. 132(1) requires a director to act honestly. The current s. 132(1) of the Act, requires a director to act in good faith in the best interest of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same. Thus the old case laws relating to the duty to act honestly continue to be relevant.

[177] Her Ladyship further said:

The test is nicely condensed in Ford's Principles of Corporations Law (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company. This test is adopted in *Charterbridge Corpn Ltd v. Lloyds Bank Ltd.* [1970] Ch. 62 at p 74, in that, to challenge a decision of the directors, the test is whether: … an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company. The above principle is often referred to as the '*Charterbridge* Principle'.

[178] In our judgment, the above passage from the judgment of *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd & Anor And Other Appeals (supra)* states correctly the objective element in the test of whether a director acted in the "best interest of the company". It is against this benchmark that one must assess the decision of the defendants in the present appeals in the divestments of a substantial portion of the plaintiff's shareholding in PEB.

[179] Applying the objective element in the test to our case, the following points have been made earlier but deserved to be reiterated. It will be recalled that, as found by the learned High Court Judge, the rationale for the second divestment, namely the need to meet the cash flow or liquidity problems of the plaintiff coupled with the demand from Shin Yang Shipyard for payment of the balance purchase price due for the vessel known as Petra Galaxy due to be delivered urgently to Shell to fulfil a contract valued at RM1.1 billion were all genuine concerns and were not 'contrived' reasons as suggested by the plaintiff. In other words, these matters were not fabricated or put up by the defendants with a view to facilitating the sale of the PEB shares to Shorefield and thereby causing injury to the plaintiff. In view of the urgency of the liquidity problem, the first defendant was justified in selling the shares under the second divestment at the depressed price of RM1.53. As such, the defendants exercised their powers as directors *bona fide* in the best interest of the plaintiff. None of these directors exercised their powers for an improper purpose or with ulterior motives. There was no evidence of personal gain by any of the impugned directors. Neither was there any evidence explaining why they would wish to inflict 'injury' on the plaintiff. Given the complexity of the circumstances prevailing at the time, the defendants, particularly the first defendant exercised due care and diligence in effecting the second and third divestments. In this regard, it is pertinent that the board of directors offered no other alternative to the liquidity problems faced by the plaintiff apart from the sale of the PEB shares. The decision to undertake the second divestment was a business judgment made by the defendants. With respect to the third divestment, none of the defendants acted in breach of their duties. This was because they were advised by Soon and PW1 that the cash flow problem for the following 12 months, ie, 2010 would deteriorate and that the plaintiff would face serious liquidity problems. The board of directors of the plaintiff including the defendants collectively considered all other options and dismissed them after deliberation, concluding that the sale of the entirety of the plaintiff's PEB shares was the only means of resolving the cash flow problem which was exacerbated by the fact that the plaintiff had suffered its first loss in corporate history for that particular quarter. The disposal price of the shares under the third divestment was higher than the mandated price of RM1.80 and the market price. It fell within the valuation range of the fairness consideration report procured by the first defendant prior to affecting the sale. In effecting the third divestment, the defendants made a business judgment and had taken professional advice and followed it. They had considered whether or not the divestment was in the plaintiff's best interests.

[180] Against that background, we therefore conclude that an honest and intelligent man in the position of the defendants would reasonably have concluded that the second and third divestments were in the best interests of the plaintiff. There was clearly no evidence that as directors of the plaintiff, the defendants had acted in breach of their duties to the plaintiff. In our opinion, what the defendants in the present case did was for a proper purpose and in good faith in the best interest of the plaintiff.

[181] A related point is the statutory business judgment rule in s. 132(1B) of the Act, which states as follows:

> A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:
>
> (a) makes the business judgment in good faith for a proper purpose;
>
> (b) does not have a material personal interest in the subject matter of the business judgment;
>
> (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
>
> (d) reasonably believes that the business judgment is in the best interests of the company.

[182] The statutory business judgment rule, which was added to the Act in 2007, provided a presumption that a director acted with due care and skill if the requisite pre-conditions are fulfilled. Section 132(6) defines "business judgment" as "any decision on whether or not to take action in respect of a matter relevant to the business of the company".

[183] As for the business judgment rule, courts have traditionally demonstrated a reluctance to substitute its own decision with the business and management decisions of the directors. The leading case in this regard is the case of *Howard Smith v. Ampol Petroleum Ltd (supra)*. In the absence of fraud, breach of fiduciary duty and conspiracy, the courts do not undertake the exercise of assessing the merits of a commercial or business judgment made by directors. Commercial realities are such that risk-taking is an unavoidable element for profits. And as pointed out by Pearlie MC Koh on *Company Law (supra)*, at p. 439 "business judgment rule exist to permit management to make honest decisions without needing to worry excessively about being in breach of their duties to the company".

[184] The facts of *Howard Smith Ltd v. Ampol Petroleum Ltd (supra)* have been well summarised by the learned High Court Judge in the present case in her judgment as follows. In that case, there was a challenge to the validity of an issue of shares by the directors of a company. The court had to decide whether the said directors had been motivated by any purpose or personal gain or advantage or whether they had acted *bona fide* in the interests of the company. The judge found that the primary purpose of the allotment was to

proportionately reduce the shareholdings of certain majority shareholders such that a take-over could be facilitated by another entity. It was found in those circumstances that the directors had improperly exercised their powers.

[185] The matter proceeded to the Privy Council where the Judicial Committee found, dismissing the appeal that, although the directors had acted honestly and had power to make the allotment, to alter a majority shareholding was to interfere with an element of the company's constitution which was separate from the directors' powers and accordingly it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. And since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid. In so holding the Judicial Committee commented *inter alia*, in relation to the business judgment rule as follows:

> … In order to assist him in deciding upon the alternative motivations contended for, the judge considered first at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors *bona fide* considered that condition to be. *Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.* But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or another, or whether there being more than one purpose, one or other purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial or, *per contra*, insubstantial an alleged requirement might have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme. (emphasis added)

[186] The Singapore High Court in *Vita Health Laboratories Pte Ltd and others v. Pang Seng Meng* [2004] 4 SLR (R) 162 upheld the rule that a court will not substitute their own judgment for that of directors, especially with the benefit of hindsight. In stressing that the court had to be slow to interfere with *bona fide* commercial decisions taken by directors, the High Court said:

> This judicial endorsement of the sanctity of business judgment is underpinned by strong policy considerations. It is the role of the marketplace and not the function of the court to punish and censure directors who have in good faith, made incorrect commercial decisions. Directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences. *Bona fide* entrepreneurs and honest commercial men should not fear that business failure entails legal liability. A company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk. Undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.

[187] The rule that a court will not substitute their own judgment for that of directors was also illustrated in *Intraco Ltd v. Multi-Pak Singapore Pte Ltd (supra)*. In this Singapore case, the court gave great weight to the commercial context and benefit of the transaction. In holding that the business decision may have been a poor management decision but was arrived at in good faith, the court said:

> We have dealt with the commercial purpose and reasons of the transactions and it is unnecessary for us to repeat them here. Suffice it here to say that the decision to purchase the debts in return for the appellants subscribing for the shares and advancing the loan was a management decision taken by the directors which turned out, in retrospect, to be a poor decision. It did not appear to us that this decision was not arrived at *bona fide*. In this respect, we found most apposite the following passage from the speech of Lord Wilberforce in *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821 at 832; [1974] 1 All ER 1126:
>
> > Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management decision on such a question, if *bona fide* arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

[188] In similar vein, Scrutton LJ in *Shuttleworth v. Cox Brothers & Company (Maidenhead), Ltd and Others* [1927] 2 KB 9 said:

> Now when persons, honestly endeavouring to decide what will be for the benefit of the company and to act accordingly, decide upon a particular course, then, provided there are ground on which reasonable men could come to the same decision, it does not matter whether the court would or would not come to the same decision or a different decision. It is not the business of the court to manage the affairs of the company. That is for the shareholders and directors. The absence of any reasonable ground for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith or for finding that the shareholders, with the best motives, have not considered the

matters which they ought to have considered. On either of these findings their decision might be set aside. But I should be sorry to see the court go beyond this and take upon itself the management of concerns which others may understand far better than the court does.

[189] The position of Business Judgment Rule in the United States, which is called "safe harbour rule", is well summarised in *Corporate Governance in Malaysia* by Rashidah Abdul Rahman and Mohammad Rizal Salim (2010 edn) at p. 218:

> In the US, the rule was designed to preserve directors' discretion and to protect them from the court's interference. Branson (1993) explained the policy bases for the rule.
>
> Branson (1993, page 338-341)
>
> (1) There is the judicial concern that persons of reason, intellect and integrity will not serve as Directors if the law expects from them a degree of prescience not possessed by people of ordinary knowledge. Even without pressing liability, qualified persons will not serve if their decisions can be second-guessed at every turn.
>
> (2) To encourage the type of informed risk-taking with which corporate enterprise is undertaken especially in an increasingly global economy.
>
> (3) On a more mundane level, courts are ill-equipped to exhume and examine business decisions. Corporate Officers and Directors make many decisions on the basis of incomplete information, intangibles such as experience or intuition and wide-ranging general considerations such as consumer preferences, local and regional economic trends and competitive outlook. Even if courts were able to assemble before them sufficient data on these topics, most courts would feel ill at ease in re-evaluating that data.
>
> (4) The rule represents a well established judicial policy of leaving management to managers and a reluctance to undertake or second-guess business decisions.
>
> (5) The rule is a means whereby courts are aided in the management and allocation of their own resources. The Business Judgment Rule is a device court use to cut off unmeritorious but complex cases at the motion or other pretrial stage. The Business Judgment Rule is thus a standard of judicial review consciously or unconsciously used as a tool for achieving judicial economy.
>
> The Business Judgment Rule in US operates as a rule of judicial economy, as a safe harbour rule or strong presumption of no liability if certain basic conditions are fulfilled. The conditions are the absence of self-interest, being reasonably informed and making a rational business judgment.

[190] This then brings us back to the present case. In our opinion, the decision to undertake the second and third divestments was a business judgment made by the defendants for a proper purpose, and in good faith in the best interest of the plaintiff.

[191] Applying *Howard Smith Ltd v. Ampol Ltd (supra)*, there was no basis for the court, with the advantage of hindsight, to substitute its own decision with that of the plaintiff's directors. There were valid grounds upon which a reasonable board of directors would have come to the decision.

[192] However, in other cases where fraud, breach of fiduciary duty and conspiracy are established, it is the duty of court to review the decisions of the directors involved.

Answers To Leave Questions

[193] In consequence and in view of all the above, our answers to the legal issues posed under Questions 1-11 are as follows:

Question 1: The powers of management conferred on directors by the Act and the articles of association of a company governed by Table A of the Act could not be overridden by an ordinary resolution passed by a simple majority of shareholders at a general meeting.

Question 2: The Court of Appeal erred when it held that "the classical position (as explained in the case of *Gramaphone and Typewriter, Limited v. Stanley*) has been varied by legislation, for instance s. 132(1) of the Act". Shareholders in general meetings may not control the powers of management conferred by the articles of associations on directors; if powers are vested in the directors, they and they alone can exercise those powers.

Question 3: We agree with the Court of Appeal in *Pioneer Haven Sdn Bhd v. Ho Hup Construction Co Bhd (supra)* that "for all intents and purposes" the scope of the directors' duties to act honestly under the old s. 132(1) and the new s. 132(1) are the same.

Question 4: The true position as regards powers of shareholders on the one hand and that of directors on the other is as declared in s. 131B of the Act that the business and affairs of a company "must be managed by, or under the direction of the board of directors", and further by s. 132(1B) that vests "business judgment" with the directors. In this regard, we note that s. 211 of our new Companies Act 2016 now provides that the business and affairs of a company "shall" be managed by the Board.

Question 5: The *ratio* in the *Credit Development Pte Ltd v. IMO Pte Ltd (supra)* adopted by the Court of Appeal is incorrect in the light of our statutory provisions and case law.

Question 6: The limiting words "subject to regulations … as may be prescribed by the company in general meeting" in art. 115(1) of the plaintiff's articles of association do not confer upon the plaintiff's shareholders in general meeting a general supervisory power over the directors whether in respect of their specific or general powers or both. The word "regulations" has the same meaning as the word "articles" such that if shareholders want to interfere whether in respect of specific or

general powers, they can only do so by altering the articles to take away the powers of the plaintiff's board of directors and this can only be done by a special resolution. We agree with the High Court that the ordinary resolution (the Shareholders Divestment Mandate) was not a "regulation" within the meaning of art. 115(1) of the plaintiff's article of association.

Question 7: The board of directors of a company who have been duly authorised by a resolution passed in a general meeting that approved the sale of shares may thereafter act in its best judgment in the interests of the company in the implementation of the resolution.

Question 8: The test to determine whether there is any breach of director duties combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director. The classic formulation of the subjective element in the test is found in *Re Smith & Fawcett Ltd (supra)*. The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. This is the test set out in *Chaterbridge Corporation Ltd v. Lloyds Bank Ltd* adopted by our Court of Appeal in *Pioneer Haven Sdn Bhd v. Ho Hup Construction (supra)*. The Court of Appeal erred when it adverted to the proposition that "the best interest of the company" is a matter for the majority of the shareholders to decide.

Question 9: The statutory business judgment rule as provided under s. 132(1B) of the Act is as stated in *Howard Smith Ltd v. Ampol Ltd (supra)*: the courts do not undertake the exercise of assessing the merits of a commercial or business judgment made by directors. Courts will not interfere with business decisions as long as the directors acted *bona fide*.

Question 10: Shareholders cannot determine or dictate what is in "the best interest of the company" by passing an ordinary resolution by a simple majority in general meeting in the context of determining the conduct of a director, pursuant to s. 132 of the Act.

Question 11: The case of *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors (supra)* is distinguishable on its facts. Hence, it is unnecessary for us to answer this question.

Conclusion

[194] On the view that we have taken and in the light of the answers to leave Questions 1-11, it is unnecessary for us to answer Questions 12-18. We would prefer to leave the resolutions of Questions 12-18 to a case where the questions must necessarily be determined.

[195] In all the above circumstances, we allow the appeal by the defendants with costs. In the result, the orders of the Court of Appeal are set aside and we hereby reinstate the order of the learned High Court Judge.